IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ROBERT G. ANDERSON, Plaintiff, vs. BAKER & TAYLOR DRILLING COMPANY, a Delaware corporation, Defendant.	)	No. 78-C-492-~~B~~ D

ORDER OF DISMISSAL

Upon joint motion of the plaintiff and the defendant, it being shown to the Court that all matters in controversy have been compromised and settled;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the suit of the plaintiff is hereby dismissed with costs of Court for this action and plaintiff's attorneys' fees assessed against plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the counter-claim filed by the defendant is hereby dismissed with costs of Court for this counter-claim and defendant's attorneys' fees assessed against the defendant.

SIGNED AND ENTERED this 30 day of April, 1979.

JUDGE OF THE UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:

EAGLETON, EAGLETON & OWENS, INC.

By Ira L. Edwards, Jr.
Ira L. Edwards, Jr.

ATTORNEYS FOR PLAINTIFF

UNDERWOOD, WILSON, SUTTON, BERRY, STEIN & JOHNSON

BOESCHE, McDERMOTT & ESKRIDGE

By
One of Counsel

ATTORNEYS FOR CROSS PLAINTIFF
BAKER & TAYLOR DRILLING CO.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 78-C-434-C
DAVID SHERRELL and VIRGINIA SHERRELL, Defendants.	)	

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 31st day of August, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendants, David Sherrell and Virginia Sherrell, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, David Sherrell and Virginia Sherrell were served by publication as shown on Proof of Publication filed herein.

It appearing that the Defendants, David Sherrell and Virginia Sherrell have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Forty-five (45), Block Ten (10), LAKEVIEW HEIGHTS AMENDED ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof; less and except a parcel of land containing .03 acres, more or less, described as beginning at the Northeast corner of Lot 45, thence South along the East line of Lot 45 a distance of 77.0 feet to the Southeast corner of Lot 45, thence North 24°07' West a distance of 83.6 feet to a point on the North line of Lot 45, thence East along the North North line a distance of 32.5 feet to the point of beginning.

THAT Robert C. Norton and Carol J. Norton did, on the 23rd day of April, 1970, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $11,000 with 8 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, David Sherrell and Virginia Sherrell, were the grantees in a General Warranty Deed from Robert C. Norton and Carol J. Norton dated November 1, 1974, filed in Book 4143, Page 149, records of Tulsa County, wherein Defendants, David Sherrell and Virginia Sherrell, assumed and agreed to pay the mortgage indebtedness being sued upon herein.

Robert C. Norton and Carol J. Norton were released from any liability under the Note and mortgage by the Veterans Administration on October 29, 1974.

The Court further finds that Defendants, David Sherrell and Virginia Sherrell, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $10,369.84 as unpaid principal with interest thereon at the rate of 8 1/2 percent per annum from November 1, 1977, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, David Sherrell and Virginia Sherrell, in rem, for the sum of $10,369.84 with interest thereon at the rate of 8 1/2 percent per annum from November 1, 1977, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United

States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED

ROBERT P. SANTEE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES J. RAPIEN, JR. a/k/a JAMES JOSEPH RAPIEN a/k/a JAMES J. RAPIEN a/k/a JAMES RAPIEN, LORETTA B. RAPIEN a/k/a LORETTA RAPIEN, MOORE MOTOR COMPANY, a Corporation, G. E. Moots d/b/a MOOTS CLINIC, AMERICAN GENERAL LIFE INSURANCE COMPANY OF TENNESSEE, a Corporation, and HOUSING AUTHORITY OF THE CHEROKEE NATION, Defendants.	)	CIVIL ACTION NO. 79-C-41-B

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 30th day of April, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; the Defendant, Moore Motor Company, a Corporation, appearing by its attorney, Paul E. Blevins; the Defendant, American General Life Insurance Company of Tennessee, a Corporation, appearing by its attorney, Gary J. Dean; and, the Defendants, James J. Rapien, Jr. a/k/a James Joseph Rapien a/k/a James J. Rapien a/k/a James Rapien, Loretta B. Rapien a/k/a Loretta Rapien, G. E. Moots d/b/a Moots Clinic, and Housing Authority of the Cherokee Nation, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, James J. Rapien, Jr. a/k/a James Joseph Rapien a/k/a James J. Rapien a/k/a James Rapien, Loretta B. Rapien a/k/a Loretta Rapien, Moore Motor Company, a Corporation, and G. E. Moots d/b/a Moots Clinic, were served with Summons and Complaint on January 26, 1979, as appears on the United States Marshal's Service herein; and, that Defendant, Housing Authority of the Cherokee Nation, was served with Summons and

Complaint on February 5, 1979, as appears on the United States Marshal's Service herein; and, that Defendant, American General Life Insurance Company of Tennessee, a Corporation, was served with Summons and Complaint on February 14, 1979, as appears on the United States Marshal's Service herein.

It appearing that the Defendant, Moore Motor Company, a Corporation, has duly filed its Answer and Cross-Petition herein on February 9, 1979; that Defendant, American General Life Insurance Company of Tennessee, a Corporation, has duly filed its Answer and Counterclaim herein on February 26, 1979; and, that Defendants, James J. Rapien, Jr. a/k/a James Joseph Rapien a/k/a James J. Rapien a/k/a James Rapien, Loretta B. Rapien a/k/a Loretta Rapien, G. E. Moots d/b/a Moots Clinic, and Housing Authority of the Cherokee Nation, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Seventeen (17), Block Three (3), SPORTSMEN ACRES FIRST ADDITION, a Subdivision in Mayes County, State of Oklahoma, according to the official Recorded Plat and Survey thereof.
>
> Said Lot having been surveyed and platted from, and lying entirely within the NW/4 of the SW/4 of the NE/4 of Section 2, Township 20 North, Range 19 East.

THAT the Defendants, James J. Rapien, Jr. and Loretta B. Rapien, did, on the 30th day of March, 1977, execute and deliver to the United States of America, acting through the Farmers Home Administration, their mortgage and mortgage note in the sum of $19,500.00 with 8 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, James J. Rapien, Jr. and Loretta B. Rapien, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $20,005.16 as unpaid principal with interest thereon at the rate of 8 percent per annum from October 13, 1978, until paid, plus the cost of this action accrued and accruing.

The Court further finds that Defendant, Moore Motor Company, a Corporation, is entitled to judgment against Defendant, James J. Rapien, in the amount of $1,321.31, together with interest thereon at the rate of 10 percent per annum from the date of the judgment and an attorney fee in the amount of $200.00, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Defendant, American General Life Insurance Company of Tennessee, a Corporation, is entitled to judgment against Defendants, James J. Rapien and Loretta B. Rapien, in the amount of $400.00 principal, plus interest thereon at the rate of 10 percent per annum from February 24, 1978, plus attorney fees in the amount of $60.00, and accrued court costs therein in the amount of $19.00, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, James J. Rapien, Jr. and Loretta B. Rapien, in personam, for the sum of $20,005.16, with interest thereon at the rate of 8 percent per annum from October 13, 1978, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant, Moore Motor Company, a Corporation, have and recover judgment, in personam, against the Defendant, James J. Rapien, in the amount of $1,321.31, together with interest thereon at the rate of 10 percent per annum from the date of the judgment and an attorney fee in the amount of $200.00, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant, American General Life Insurance Company of Tennessee, a Corporation, have and recover judgment, in personam, against the Defendants, James J. Rapien and Loretta B. Rapien, in the amount of $400.00 principal, plus interest thereon at the rate of 10 percent per annum from February 24, 1978, plus attorney fees in the amount of $60.00, and accrued court costs therein in the amount of $19.00, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, G. E. Moots d/b/a Moots Clinic and Housing Authority of the Cherokee Nation.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed

of any right, title, interest or claim in or to the real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE
Assistant United States Attorney

PAUL E. BLEVINS
POPLIN & BLEVINS, INC.
Attorney for Defendant,
Moore Motor Company

GARY J. DEAN
LYONS & DEAN
Attorney for Defendant,
American General Life Insurance
Company of Tennessee

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICK BASNETT,

Plaintiff,

vs.

LARRY GREENE, ET AL.,

Defendants.

No. 77-C-136-B

FILED

Clerk
COURT

ORDER

This matter coming on before me the undersigned Judge of the United States District Court, and the Court being fully advised in the premises finds that this case should be voluntarily dismissed upon the stipulation of the parties pursuant to Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED, that this case be and is hereby voluntarily dismissed upon the stipulation of the parties hereto, pursuant to Federal Rules of Civil Procedure.

Dated this 27 day of ~~March~~ April, 1979.

JUDGE OF THE UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT WITHIN AND FOR

THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA for the use and benefit of THE FIRESTONE TIRE AND RUBBER COMPANY, doing business under the assumed name and style of FIRESTONE TRUCK TIRE CENTER, a Foreign Corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 78-C-539-B
UTILITY CONTRACTORS, INC., a Foreign Corporation; MID-STATES CONSTRUCTION OF DERBY, INC., a Foreign Corporation; and FEDERAL INSURANCE COMPANY, a Foreign Corporation,	)	
Defendants.	)	

ORDER TO DISMISS WITH PREJUDICE

NOW on this 27th day of April, 1979, this matter comes on for hearing before the undersigned Judge of the United States District Court upon the Plaintiff's Motion to Dismiss with Prejudice. Wherefore, the Court being fully advised in the premises, after having reviewed the pleadings filed herein, and being advised that Plaintiffs and Defendants agree to the above styled and numbered cause being dismissed with prejudice enters the following order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause be dismissed with prejudice.

(Signed) H. Dale Cook

JUDGE OF THE U. S. DISTRICT COURT

APPROVED AS TO FORM:

H. DUANE RIFFE, Attorney for
Firestone Tire and Rubber Co.

RAYBON MARTIN, Attorney for
Utility Contractors, Inc. and
Federal Insurance Company

FILED

APR 27 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 79-C-35-BC
STEPHEN M. HAUSE, et. al., Defendants.	)	

NOTICE OF DISMISSAL

COMES NOW the United States of America by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and herewith dismisses this action, without prejudice.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 27th day of April, 1979

Assistant United States Attorney

cl

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LARRY JACKSON, Plaintiff, vs. THE CAR CARE CORPORATION, d/b/a CAR CARE FIRESTONE SERVICE CENTER, an Oklahoma Corporation, Defendant.	)	No. 79-C-225-C

NOTICE OF DISMISSAL

Comes Now the plaintiff, Larry Jackson and hereby notifies the above-named defendant that the above-captioned lawsuit is hereby dismissed with prejudice, by the plaintiff herein.

Dated this 27th day of April, 1979.

Paul F. McTighe, Jr.
Attorney for Plaintiff
424 Beacon Building
Tulsa, Oklahoma 74103
PH: (918) 582-8850

CERTIFICATE OF MAILING

I, Paul F. McTighe, Jr., do hereby certify that I mailed a true and correct copy of the above and foregoing Notice of Dismissal to: The Car Care Corporation, d/b/a Car Care Firestone Service Center, an Oklahoma Corporation, c/o Mr. Gordon L. Patten, service agent, 324 Main Mall, Tulsa, Oklahoma 74103.

Paul F. McTighe, Jr.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
GLENWOOD PLAZA APARTMENTS PROJECT, INC., TRINITY REAL ESTATE COMPANY, and RICHARD H. SMITH,	)	
	)	
	)	CIVIL ACTION
Defendants.	)	NO. 78-C-280-C

JUDGMENT OF FORECLOSURE

THIS MATTER comes on for consideration this 2nd day of April, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendants, Trinity Real Estate Company, a corporation, and Richard H. Smith, the court appointed Receiver for Trinity Real Estate Company, appearing by their attorney, Allen E. Barrow, Jr., and the Defendant, Glenwood Plaza Apartments Project, Inc., appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Trinity Real Estate Company, a corporation, and Richard H. Smith, Receiver, were served with Summons and Complaint on June 29, 1978; and that Defendant, Glenwood Plaza Apartments Project, Inc., was served by serving the Secretary of State with Summons and Complaint on June 26, 1978, all as appears on the United States Marshal's Service herein.

It appearing that the Defendants, Trinity Real Estate Company, a corporation, and Richard H. Smith, Receiver, have

filed their Answer herein on August 2, 1978, and it further appearing that the Defendant, Glenwood Plaza Apartments Project, Inc., has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage and Financing Statements and Security Agreement, all securing said mortgage note, upon the following described real property located in Creek County, Oklahoma, within the Northern Judicial District of Oklahoma, to-wit:

> A tract of land in Block Two (2) and the North Half (N/2) of Block Three (3) in the GLENWOOD ADDITION to the City of Sapulpa, Creek County, Oklahoma, more particularly described as follows: Beginning at a point 260 feet South of the Northwest corner of said Block Two (2), thence South along the east right-of-way line of Mission Street a distance of 350 feet, thence East a distance of 270 feet, thence North a distance of 350 feet, thence West a distance of 270 feet to the point of beginning.

The Defendant, Glenwood Plaza Apartments Project, Inc., did, on the 23rd day of April, 1971, execute and deliver to Midwest Mortgage Company its mortgage, Financing Statements and Security Agreement, and mortgage note in the amount of $530,500.00 with 7-1/2 percent interest per annum and further providing for the payment of monthly installments of principal and interest. The Court further finds that Plaintiff is now the lawful owner of said mortgage note, mortgage, and Security Agreement by virtue of mesne assignments as set out in the Complaint herein. The Court further finds that the Defendant, Trinity Real Estate Company, a corporation, was the grantee in a deed from Defendant, Glenwood Plaza Apartments Project, Inc., filed September 13, 1976, in Book 43, Page 385, records of Creek County, Oklahoma, wherein Defendant, Trinity Real Estate Company, a corporation, took such property subject to the mortgage indebtedness being sued upon herein.

The Court further finds that on the 13th day of June, 1977, the Defendant, Richard H. Smith, was duly appointed as the Receiver for the dissolution of Trinity Real Estate Company by the District Court in and for Tulsa County, State of Oklahoma, in the case styled In The Matter of The Voluntary Dissolution of Trinity Real Estate Company, No. C 77-1221.

The Court being fully advised finds that all of the allegations and averments in the Complaint filed herein are true and that this Court has jurisdiction of the subject matter and parties and that the Defendants, Glenwood Plaza Apartments Project, Inc. and Trinity Real Estate Company, a corporation, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon which default has continued and that by reason thereof the Defendants, Glenwood Plaza Apartments Project, Inc. and Trinity Real Estate Company, are now indebted to the Plaintiff in the sum of Six Hundred Fifty-eight Thousand, Nine Hundred Twenty-one Dollars and Ninety-six Cents ($658,921.96) as of January 12, 1979, plus interest at the rate of $135.39 per day, until paid.

The Court further finds that the Plaintiff has a first, valid, and prior lien upon the real estate herein described and all buildings and improvements situated thereon by virtue of the mortgage set forth in Plaintiff's Complaint and attached as Exhibit B, said mortgage from Glenwood Plaza Apartments Project, Inc. to Midwest Mortgage Company, being filed April 23, 1971, and recorded in Book 4, Pages 244-47, records of Creek County, Oklahoma; and by virtue of Assignment of Mortgage of Real Estate from Midwest Mortgage Company to Federal National Mortgage Association, recorded April 5, 1973, in Book 17, Page 146, records of Creek County, Oklahoma; and by virtue of an

Assignment of Mortgage of Real Estate from Federal National Mortgage Association to the Secretary of Housing and Urban Development filed June 19, 1975, in Book 32, Pages 1463-65, records of Creek County, Oklahoma.

The Court further finds that Plaintiff has a first, valid, and prior lien upon all the personal property herein being foreclosed by virtue of a Security Agreement dated April 5, 1973, attached hereto as Exhibit C, and Financing Statements in favor of Midwest Mortgage Company executed by Glenwood Plaza Apartments Project, Inc., which Financing Statements were filed in the Office of County Clerk of Creek County on April 5, 1973, as File No. 73-2732, and in the Office of the County Clerk of Oklahoma County on April 5, 1973, as File No. 062062, and in the Office of the County Clerk of Creek County on April 5, 1973, as File No. 4338. Said Security Agreement and Financing Statements were further assigned and Plaintiff is now the lawful owner and holder of said Security Agreement by virtue of unrecorded assignments and the filing of UCC-3 notices of assignment, to-wit:

Exhibit I	UCC-3 referencing Financing Statement No. 73-2732, filed June 19, 1975, with Clerk of Creek County, Oklahoma.	
	Assignment from:	Federal National Mortgage Association
	to:	Secretary of Housing and Urban Development
Exhibit J	UCC-3 referencing Financing Statement No. 60262 filed June 23, 1975, with Clerk of Oklahoma County, Oklahoma.	
	Assignment from:	Federal National Mortgage Association
	to:	Secretary of Housing and Urban Development
Exhibit K	UCC-3 referencing Financing Statement No. 4338, filed June 19, 1975, with Creek County Clerk, Sapulpa, Oklahoma.	
	Assignment from:	Federal National Mortgage Association
	to:	Secretary of Housing and Urban Development

An itemized list of all the said personal property acquired by Plaintiff by said Assignment of Financing Statement is attached hereto and made a part hereof as Exhibit 1.

The Court further finds that nothing in this judgment or any exoneration of the Defendant, Glenwood Plaza Apartments herein shall operate as a prejudice or preclude Plaintiff in any way, manner or form from instituting any action or suit hereinafter against the Defendant, Glenwood Plaza Apartments Project, Inc., for any violation by such Defendant, if any, under the Regulatory Agreement for Multi-Family Housing Projects executed in connection with or pursuant to the Promissory Note and Real Estate Mortgage referred to and foreclosed herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff has a valid, prior, and superior lien upon the real estate, together with all buildings and improvements situated thereon by virtue of its mortgage; and a valid, prior, and superior lien upon all the personal property described in Exhibit 1 by virtue of its Financing Statements and Security Agreement, and that Plaintiff have and recover judgment against the Defendant, Glenwood Plaza Apartments Project, Inc., in personam, for the sum of Six Hundred Fifty-eight Thousand, Nine Hundred Twenty-one Dollars and Ninety-six Cents ($658,921.96) as of January 12, 1979, plus interest at the rate of $135.39 per day, until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Defendant, Glenwood Plaza Apartments Project, Inc., is obligated under the terms of the Regulatory Agreement for Multi-Family Housing Projects and that nothing shall preclude Plaintiff in any way, manner, or form from instituting any action or suit hereinafter against Glenwood Plaza Apartments Project, Inc. for

violation, if any, of such agreement executed in connection with or pursuant to the Promissory Note and Real Estate Mortgage referred to and foreclosed herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Real Estate Mortgage of the Plaintiff, United States of America, be and the same is hereby established and adjudged to be a valid first mortgage lien upon the real estate hereinabove described; and the Financing Statements and Security Instruments of the Plaintiff, United States of America, be and the same are hereby established and adjudged to be a first and prior security interest upon all the personal property and chattels described in Plaintiff's Security Instruments and also described in Exhibit 1 attached herewith; that both the Real Estate Mortgage and Security Agreement hereinbefore described were executed to secure payment of the aforesaid sums due the Plaintiff and that the Real Estate Mortgage and Security Instrument be, and the same are hereby ordered foreclosed; provided, such foreclosure of rents or other proceeds collected prior to the initiation of this suit and presently under the control of Defendant, Richard H. Smith, as Receiver for Trinity Real Estate Company, shall be subject to the administration, control, and final order of distribution of the District Court in and for Tulsa County, Oklahoma in the case numbered C 77-1221. And, it further appearing to the Court that the said Real Estate Mortgage of the Plaintiff contains the provision that the mortgagor waives all benefits of all homestead and exemption laws; and the appraisement of said premises expressly waived or not waived at the option of the mortgagee, and the Court finds that Plaintiff has elected its option under the mortgage to have said real estate sold with appraisement.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff have and recover judgment, in rem, against the Defendants, Trinity Real Estate Company, a corporation,

and Richard H. Smith, Receiver of Trinity Real Estate Company; provided such judgment with regard to rents and other proceeds collected prior to the initiation of this suit and presently under the control of Defendant, Richard H. Smith, as Receiver for Trinity Real Estate Company, shall be subject to the administration, control, and final order of distribution of the District Court in and for Tulsa County, Oklahoma in the case numbered C 77-1221.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that upon the failure of said Defendant, Glenwood Plaza Apartments Project, Inc., to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, with appraisement, the real estate and personal property, in one lot, upon the following terms to be announced by the Marshal prior to the acceptance of bids; a minimum of ten percent (10%) down by cashier's or certified check payable the day of the sale, at the conclusion thereof, and the remainder of such bid price shall be payable by the highest bidder within thirty (30) days from the date of the sale. In the event the highest bidder cannot or does not pay the remainder of such bid price thirty (30) days from the date of sale, such highest bidder shall forfeit the ten percent (10%) deposit, and the said property shall be re-advertised for sale and sold according to law. Said real and personal property will be sold free and clear and discharged from any and all interests, claims, and liens of all the Defendants herein and all persons claiming under them prior to or since the filing of the Complaint herein and that from the proceeds arising from said sale, the Marshal be and he is hereby ordered and directed to pay:

First: Costs of the sale and of this action.

Second: Judgment of the Plaintiff for and on behalf of its Agency and Instrumentality, Department of Housing and Urban Development, including principal, interest, and any and all advancements made by the Plaintiff.

Third: Balance remaining, if any, be paid into Court to abide the further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that from and after the sale of the real estate and personal property herein described under and by virtue of this judgment and decree that all of the said parties to this action, Glenwood Plaza Apartments Project, Inc., Trinity Real Estate Company, a corporation, and Richard H. Smith, Receiver of Trinity Real Estate Company, and all persons claiming by, through, or under these said parties prior to or since the filing of the Complaint herein, be and they are hereby forever barred, foreclosed, and enjoined from asserting or claiming any right, title, interest, lien, mortgage estate, or equity or redemption in and to the said premises or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE,
Assistant United States Attorney

ALLEN E. BARROW, JR.,
Attorney for Defendant,
TRINITY REAL ESTATE COMPANY, and
RICHARD H. SMITH

RICHARD H. SMITH,
RECEIVER
TRINITY REAL ESTATE COMPANY

40 Hotpoint GHDA 310A04NP	Dishwashers
40 Hotpoint RGS 25AAV	Range and Ovens
40 Hotpoint SSD 12CLFRAV	Refrigerators
40 Hotpoint GAMH 300	Disposals

EXHIBIT 1

AK/jr
4/25/79

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED WIRE CRAFT, INC., a corporation,	)	
Plaintiff,	)	
vs.	)	No. 79-C-148-C
FRAGRANCES UNLIMITED, INC., a corporation, and THOMAS HIGGS, an individual, a/k/a THOMAS M. HIGGS,	)	
Defendants.	)	

FILED
APR 26 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

The Defendants, Fragrances Unlimited, Inc. and Thomas Higgs a/k/a Thomas M. Higgs, having been regularly served with process, and having failed to appear and answer the Plaintiff's Complaint filed herein, and the default of said Defendants having been duly entered, and it appearing that said Defendants, Fragrances Unlimited, Inc. and Thomas Higgs a/k/a Thomas M. Higgs, are not infants, incompetents, nor members of any military service, and it appearing by the affidavit that Plaintiff is entitled to judgment herein,

IT IS ORDERED AND ADJUDGED that the Plaintiff have and recover from the Defendants, Fragrances Unlimited, Inc., and Thomas Higgs a/k/a Thomas M. Higgs, jointly and severally judgment in the principal sum of $14,702.67 with interest thereon at the rate of 10 % per annum from April 26, 1979, until paid, together with costs in the sum of $ 11.76 .

~~IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff have and recover from the Defendant Thomas Higgs a/k/a Thomas M. Higgs a judgment in the principal sum of $13,800.00 with interest thereon at the rate of 10% per annum from August 5, 1978, until paid, together with costs in the sum of $_____~~, and an attorneys fee in the sum of $ 3000.00 .

Dated this 26th day of April, 1979.

~~Jack C. Silver, Clerk~~

By (Signed) H. Dale Cook
~~Deputy United States District Court Clerk~~ U.S. DISTRICT JUDGE

LAW OFFICES
UNGERMAN, CONNER, LITTLE, UNGERMAN & GOODMAN
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/24/79
MH:deg

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN ZINK COMPANY,
a Delaware corporation,

Plaintiff,

vs.

MIDWEST MECHANICAL
CONTRACTORS, INC., a
Missouri corporation,

Defendant.

NO. 79-C-165-C

FILED

APR 25 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Came on for consideration, this 25th day of April, 1979, Plaintiff's application for dismissal. For good cause shown:

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the above-styled and numbered cause be and hereby is dismissed on the application of the Plaintiff.

/s/ H Dale Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

POWELL ENTERPRISES, INCORPORATED d/b/a POWELL CONSTRUCTION COMPANY, a corporation,	)	
Plaintiff,	)	
vs.	)	No. 78-C-244-B
SKAGGS SUPERCENTERS, INC., a Texas corporation,	)	
Defendant.	)	

ORDER AMENDING ORDERS OF
MARCH 15 AND APRIL 19, 1979

The Plaintiff has moved the Court to amend the Orders of March 15 and April 19, 1979, to provide that the dismissal of Plaintiff's Second Cause of Action for damages was without prejudice. The matter was heard on April 25, 1979, the Plaintiff appearing by its attorneys T. H. Eskridge and Royce H. Savage, and the Defendant appearing by its attorney Murray E. Abowitz. The Court heard statements and argument of Counsel, and being well and truly advised in the premises, makes the following findings and enters the following order:

1. The Court's Order of March 15, 1979, provided that ... "the Motion to Dismiss for lack of jurisdiction and failure to state a claim filed by the Defendant be and the same is hereby sustained" ... and that ... "this cause of action and Complaint be and the same are hereby dismissed".

2. In the April 19, 1979, Order of the Court, it was stated that:

> "It was the opinion of the Court, at the time the case was reviewed that the First Cause of Action failed to state a claim and should be dismissed. It also was the opinion of the Court that the Second Cause of Action was contingent upon Plaintiff prevailing on the First Cause of Action. The Court, therefore, dismissed the First Cause of Action and the entire Complaint, such Order being dispositive of the lawsuit in the posture it maintained before the Court at that time."

3. Rule 41(b) of the Federal Rules of Civil Procedure, provides in part that:

> "Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision (Rule 41(b)) and any dismissal not provided for in this Rule (Rule 41), other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

4. It was never the intention of the Court that the dismissal of Plaintiff's cause of action for damages operate as an adjudication upon the merits, and the Court does here and now amend its Orders of March 15 and April 19, 1979, to so specify.

5. Plaintiff's Motion to Amend Judgment Under Rule 59(e) or in the Alternative Motion for Relief from Judgment Under Rule 60(b) filed on April 23, 1979, are both timely and well taken.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Court's Orders of March 15 and April 19, 1979, be and the same are hereby amended to provide that the dismissal of Plaintiff's Second Cause of Action, being the action seeking to recover damages, shall be and is hereby declared to be wholly without prejudice to the refiling thereof, and such dismissal shall not operate as an adjudication upon the merits. Neither party having been prejudiced hereby, each shall bear its own costs.

DONE IN OPEN COURT this 25th day of April, 1979.

(Signed) H. Dale Cook

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LOWELL E. CURTIS AND THELMA M. CURTIS, husband and wife,

Plaintiffs,

v.

ALPHONSE S. VANNI, an individual, and FARMERS INSURANCE COMPANY, INC., a foreign corporation,

Defendants.

No. 78-C-499-D

JUDGMENT

This cause having been considered by the Court on the entire file, including all Briefs and interrogatories, the Court is of the opinion as shown by its Order filed simultaneously this date, that no material issues of fact exist as to the liability of defendant Farmers Insurance Company, Inc., and that said defendant is entitled to judgment in its favor, and against the plaintiffs, as a matter of law.

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that Judgment be entered in favor of defendant Farmers Insurance Company, Inc., and against plaintiffs Lowell E. Curtis and Thelma M. Curtis.

Dated this 24 day of April, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BROUWER TURF EQUIPMENT LIMITED A CORPORATION OF THE PROVINCE OF ONTARIO, CANADA Plaintiff -vs- BERT BOLES, an individual Defendant	)	Civil Action No. 79-C-52-C

CONSENT JUDGMENT

PURSUANT TO AGREEMENT OF THE PARTIES, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction of the subject matter of this cause and the parties hereto.

2. The plaintiff, Brouwer Turf Equipment Limited, is the owner of United States Letters Patent No. 3,464,641, issued September 2, 1969, upon the application of Gerardus J. Brouwer, and all rights of action for infringement thereof.

3. The plaintiff, Brouwer Turf Equipment Limited, is the owner of United States Letters Patent No. 3,509,944, issued May 5, 1970, upon the application of Gerardus J. Brouwer, John Van Dyken and Klaas Oussoren, and all rights of action for infrigement thereof.

4. The plainfiff, Brouwer Turf Equipment Limited, is the owner of United States Letters Patent No. 3,790,096, issued November 17, 1970 to Gerardus J. Brouwer and all rights of action for infringement thereof.

5. The plaintiff, Brouwer Turf Equipment Limited, is the owner of United States Letters Patent No. 3,590,927, issued July 6, 1971 to Gerardus J. Brouwer, John Van Dyken and Klaas Oussoren, and all rights of action for infringement thereof.

6. The claims of United States Letters Patent No. 3,464,641, and each of them, are good and valid in law.

7. The claims of United States Letters Patent No. 3,509,944, and each of them, are good and valid in law.

8. The claims of United States Letters Patent No. 3,790,096, and each of them, are good and valid in law.

9. The claims of United States Letters Patent No. 3,590,927, and each of them, are good and valid in law.

10. The defendant, Bert Boles has made and used, without the consent of plaintiff, a Sod Rolling Apparatus covered by one or more of the claims of the United States Letters Patent No. 3,464,641.

11. The defendant, Bert Boles, has made and used, without the consent of plaintiff, a Sod Cutting Apparatus covered by one or more of the claims of the United States Letters Patent No. 3,509,944.

12. The defendant, Bert Boles, has made and used, without the consent of plaintiff, a Device for Starting a Turn in the end of a Sod Strip covered by one or more of the claims of the United States Letters Patent No. 3,790,096.

13. The defendant, Bert Boles, has made and used, without the consent of plaintiff, a Mounting for Sod Cutting Machine covered by one or more of the claims of the United States Letters Patent No. 3,590,927.

14. The defendant, Bert Boles, his successors in interest and all acting in concert or participation with him, and each of them, are permanently enjoined from directly or indirectly making, using, selling or causing to be made, used or sold any Sod Rolling Apparatus covered by one or more claims of said Patent No. 3,464,641, during the term of said patent, without the license or consent of plaintiff, and from knowingly in any manner aiding or contributing to the making, using or selling without the license or consent of palintiff, of any apparatus covered by one or more claims of said patent.

15. The defendant, Bert Boles, his successors in interest and all acting in concert or participation with him, and each of them, are permanently enjoined from directly or indirectly making, using, selling or causing to be made, used or sold any Sod Cutting Apparatus covered by one or more claims of said Patent No. 3,509,944, during the term of said patent, without the license or consent of plaintiff, and from knowingly in any manner aiding or contributing to the making, using or selling without the license or consent of plaintiff, of any apparatus covered by one or more claims of said patent.

16. The defendant, Bert Boles, his successors in interest and all acting in concert or participation with him, and each of them, are permanently enjoined from directly or indirectly making, using, selling or causing to be made, used or sold any Device for Starting a Turn in the End of a Sod Strip covered by one or more claims of said Patent No. 3,790,096, during the term of said patent, without the

license or consent of plaintiff, and from knowingly in any manner aiding or contributing to the making, using or selling without the license or consent of plaintiff, of any apparatus covered by one or more claims of said patent.

17. The defendant, Bert Boles, his successors in interest and all acting in concert or participation with him, and each of them, are permanently enjoined from directly or indirectly making, using, selling or causing to be made, used or sold any Mounting for Sod Cutting Machine covered by one or more claims of said Patent No. 3,590,927, during the term of said patent, without the license or consent of plaintiff, and from knowingly in any manner aiding or contributing to the making, using or selling without the license or consent of plaintiff, of any apparatus covered by one or more claims of said patent.

18. Defendant shall pay to plaintiff as damages for defendant's infringement of U.S. Patent Nos. 3,464,641; 3,509,944; 3,790,096; and 3,590,927 and each of them, the sum of Six Thousand Dollars ($6,000) payable upon the entry of this Judgment;

19. Defendant shall pay to plaintiff, as plaintiff's attorney's fees and costs the sum of One Thousand Two Hundred Dollars ($1,200) payable upon the entry of this Judgment.

Entered this 24th day of July, 1979, at Tulsa, Oklahoma.

Allen E. Barrow

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LOWELL E. CURTIS AND THELMA M. CURTIS, husband and wife,

Plaintiffs,

v.

ALPHONSE S. VANNI, an individual, and FARMERS INSURANCE COMPANY, INC., a foreign corporation,

Defendants.

No. 78-C-499-D

ORDER

The Court has before it for consideration the motion of Defendant Farmers Insurance Company asking that summary judgment in its favor be granted against Plaintiffs. The Court has reviewed the entire file in this matter, including the briefs filed herein by the parties and the answers of Defendant Alphonse Vanni to Plaintiffs' interrogatories, as well as the findings and recommendations of the Magistrate concerning the motion.

This is an action brought against the Defendants Alphonse S. Vanni (Vanni) and Farmers Insurance Company, Inc. (Farmers). Plaintiffs contend that they sustained damages as a result of an automobile accident on May 10, 1978, in which an automobile driven by Plaintiff Thelma M. Curtis collided with an automobile driven by Defendant Vanni. In addition to suing Vanni, Plaintiffs joined Farmers as a defendant, alleging that the Plaintiffs had uninsured motorist automobile coverage with Farmers and that the Defendant Vanni is an "uninsured motorist" within the terms of Title 36 O.S. §3636. Farmers denies that Vanni is an uninsured motorist under Title 36 O.S. §3636 and argues that based upon the uncontroverted facts and law it is entitled to summary judgment.

Title 36, §3636 of the Oklahoma Statutes states in pertinent part:

> For the purposes of this coverage the term "uninsured motor vehicle," shall include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal

> liability of its insured within the limits specified therein because of insolvency or whose liability insurer for any reason either cannot or is not legally required to afford at least the per person coverage limits with respect to the legal liability of its insured, applicable to any injured party under any uninsured motorist coverage covering such injured party.

The theory upon which uninsured motorist insurance coverage is based assumes that the driver responsible for the accident is liable to the injured party or parties, and has no defenses available to him under which liability might be avoided. Furthermore, the party liable must be uninsured. Under these circumstances, the insurer of the injured parties agrees, under the uninsured motorist clause of its policy, to compensate the injured. See Davis, Uninsured Motorist Coverage: Some Significant Problems and Developments, 42 Mo. L. Rev. 1 (1977); Insurance, Annual Survey of Oklahoma Law, 3 Okla. City U. L. Rev. 262, 268 (1978); Note, Uninsured Motorist Coverage - Proving the Uninsured Status of the Tortfeasor Motorist, 31 Okla. L. Rev. 726 (1978).

In the Note last cited above, the author identified the following instances in which a motorist could be termed "uninsured:"

> The tortfeasor is deemed uninsured not only if he has no insurance, but also if (1) his insurance is less than the amount or limits statutorily prescribed; (2) his liability insurer is unable to make payment because of insolvency; (3) his liability insurer is not legally required to afford coverage; (4) he is a hit-and-run motorist. These extended definitions of "uninsured" are designed to facilitate the objective of the coverage, which is to provide compensation where none is available from the tortfeasor or his insurance company.

31 Okla. L. Rev. 726.

Title 36 O.S. §3636 was recently construed by the Oklahoma Supreme Court in the case of Mid-Continent Cas. Co. v. Theus, 50 Okla. B. J. 341 (No. 52940, February 13, 1979). In that case, the plaintiff commenced an action against the alleged tortfeasor and Mid-Continent, plaintiff's own insurance carrier. Plaintiff there alleged that she had been injured in an automobile accident caused by a motorist, who was covered by insurance in the statutorily required amounts of $5,000 per person and $10,000 per accident. Plaintiff's petition stated that her uninsured motorist coverage was the same as these limits.

The Oklahoma Court interpreted the statute in question as meaning:

> Under the amendment a motorist is "uninsured" if his liability carrier cannot or is not legally obligated to pay as much of his liability as would be available to the injured person under the injured's uninsured motorist coverage. This amendment expands the coverage to include the instance when an injured party's uninsured motorist coverage is greater than the tortfeasor's liability coverage. In that circumstance, the tortfeasor is an "uninsured motorist." (Emphasis added.)

The amended §3636, then, provides a fifth situation, in addition to those pointed out supra, in which a motorist will be deemed "uninsured", that is, when the limits of his policy are less than the uninsured motorist coverage carried by the victim. More properly, such a motorist is an "under-insured" motorist.

The court in Mid-Continent rejected the plaintiff's argument that the language of 36 O.S. §3636(c) defined an "uninsured" motorist as one who is "legally liable for more than his insurance carrier is legally obligated to pay". Inasmuch as the plaintiff's uninsured motorist coverage limits were equal to the coverage actually carried by the tortfeasor, the court concluded that the statute authorized no action against the plaintiff's own insurance carrier.

In the present action the parties agree that Plaintiffs have an automobile insurance policy written by Farmers, and that that policy provides for uninsured motorist coverage with maximum limits of $5,000 for each person and $10,000 for each occurrence.

The parties do not dispute that Defendant Vanni is covered by automobile liability insurance. Vanni, in his answers to Plaintiffs' interrogatories, states as follows:

> INTERROGATORY NO. 1: Did defendant, Alphonse S. Vanni, an individual, carry automobile liability insurance against occurrences of the nature alleged by plaintiffs?
>
> ANSWER: Yes.
>
> INTERROGATORY NO. 2: If the answer to the preceding interrogatory is in the affirmative, please state:
>
> (a) identify defendant Vanni's insurer by name and address;
>
> (b) state the limits of said automobile liability insurance policy;
>
> (c) state whether or not the policy was in effect on the date of the alleged occurrence;

(d) state when and where such policy may be examined by counsel for the plaintiffs.

ANSWER:

(a) Continental Insurance Company, 80 Maidenlane, New York, New York 10038

(b) 200/500/50

(c) Yes.

(d) Continental Insurance Company, Continental Building, Dallas, Texas 75221.

. . . .

INTERROGATORY NO. 4: At the time of the alleged occurrence, were you insured against events similar to or identical to the alleged occurrence by automobile liability insurance?

ANSWER: Yes.

It is clear that Vanni was covered, at the time of the accident, by automobile liability insurance far in excess of the limit of uninsured motorist coverage carried by Plaintiffs.

Plaintiffs, in their Objections to the Magistrate's Findings and Brief in Support, state:

> [The Magistrate's Findings are based] on the recently-decided case of Mid-Continent Casualty Company v. Theus, Vol. 50, No. 7, O.B.J. p. 341 (February 17, 1979). Said case is clearly dispositive of the situation where the uninsured motorist coverage is the "same" as the coverage by the tort feasor. Plaintiffs submit that the Mid-Continent case by dicta indicates that a cause of action cannot be had likewise in the situation where the uninsured motorist coverage is less than the coverage of the tort feasor, although this situation is not clearly expressed. (Emphasis added.)

The Court is in full agreement with Plaintiffs' reading of the Mid-Continent case.

Under the ruling of Mid-Continent, Plaintiffs in this case have no claim against Farmers under Title 36 O.S. §3636, since the limits of the uninsured motorist provision of Plaintiffs' policy with Farmers are less than the maximum limits of Vanni's automobile liability insurance. Under the undisputed facts presented, Vanni cannot be an "uninsured" motorist as defined by §3636.

IT IS THEREFORE ORDERED that the Motion for Summary Judgment of Farmers Insurance Company be sustained.

It is so ordered this 24th day of April, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLARD JOSEPH COFFMAN and JACKIE RAYE COFFMAN, Defendants.	)	CIVIL ACTION NO. 79-C-14-B

FILED

APR 24 1979

Jack C. Silver, Clerk
U. S. District Court

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff herein, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 24th day of April, 1979.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 24th day of April, 1979.

Assistant United States Attorney

cl

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAMES JOSEPH BLOZY,

Petitioner Pro Se,

vs.

MACK H. ALFORD, Warden, et al.,

Respondents.

79-C-2-C

ORDER

Petitioner, James Joseph Blozy, was convicted in the District Court of Tulsa County, State of Oklahoma, in case number CRF-76-258, of robbery with a firearm. The case was tried to a jury, and the petitioner received a sentence of 20 years incarceration. He duly appealed his case to the Oklahoma Court of Criminal Appeals and the conviction and sentence were affirmed, Case No. F-76-596, Blozy v. State, 557 P.2d 451 (Okl.Cr. 1976). Petitioner thereafter filed an application for post-conviction relief, which was denied by the District Court of Tulsa County, and on appeal, the denial was affirmed by the Oklahoma Court of Criminal Appeals, Case No. PC-78-609.

On January 4, 1979, petitioner instituted the present litigation for writ of habeas corpus pursuant to 28 U.S.C.A. §2254, and on March 19, 1979, an Order was entered directing Respondents to respond to said Petition.

The file reveals that the petitioner has not exhausted his state court remedies as to all of his contentions, as will be hereinafter more evident.

The Petitioner demands his release from custody, claiming that he is being deprived of his liberty in violation of his rights and the Constitution of the United States.

The Petitioner's complaints can be summarized as follows:

(a) The prosecutor was allowed to discuss the subject of parole and probation during voir dire examination.*

(b) The jury requested information regarding parole and probation during deliberations.*

(c) The trial court did not excuse a prospective juror for cause who admitted knowing the victim of the crime forcing defense to exercise one of its peremptory challenges and go to trial with an unsatisfactory jury.*

(d) Written hearsay was admitted and the prosecution was permitted to question the defendant regarding a letter received while in custody of the Tulsa County Jail.*

(e) The prosecutor was allowed to allude to alleged conversations between defendant and his counsel, and in closing argument the prosecutor mistakenly remembered as offficer's testimony as being that of the defendant.*

(f) The court curtailed closing argument of defense counsel by sustaining an objection of the prosecution.*

(g) An erroneous instruction was given to the jury regarding "Force and Fear" in defining robbery by firearms.*

(h) The Court did not allow the prosecutor to testify when called by the defense to show a relationship between the prosecutor and the complaining witness showing the prosecutor's bias against the defendant.

(i) The prosecutor illicited perjured testimony and employed distortion, innuendo and misstatement of facts to prejudice the jury.*

(j) The sentence imposed is excessive.*

(k) Appointed defense counsel was incompetent.

(l) There was an illegal search and seizure in regard to the car where the weapon was found and in which defendant was a passenger in that there was no valid, legal reason to stop the car.

The Respondent, on April 13, 1976, filed a Response, and thereafter the transcript of the State Court proceedings was received. The Court has reviewed the entire file, including the State Court proceedings, and the case is now ready for dispositive ruling.

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* These grounds were raised in the direct appeal in Blozy v. State, 557 P.2d 451 (Okl.Cr. 1976) and rejected by that Court.

In Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the Supreme Court laid down the test applicable to a determination of whether the petitioner was entitled to an evidentiary hearing, as follows:

> ....If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

In reviewing the record, under the test of Townsend, the Court finds that an evidentiary hearing is not necessary.

The Court finds that the complaints of the petitioner contained in (a) through (i) recited hereinabove, do not rise to the dignity of constitutional questions. As stated in Karlin v. State of Okl., 412 F.Supp. 635, 637 (USDC WD Okl. 1976):

> The petitioner apparently misconceives the scope of federal habeas corpus. Habeas corpus in the federal courts does not serve as an additional appeal from State Court convictions. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Federal habeas corpus relief is available to state prisoners only on denial by the state of federal constitutional rights. 28 U.S.C.A. §2254; Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); United States ex rel. Little v. Twomey, 477 F.2d 767 (C.A. 10 1973), Mathis v. People of the State of Colorado, 425 F.2d 1165 (C.A. 10 1965). None of petitioner's appellate claims are of federal constitutional dimensions....

See also Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir. 1976).

Petitioner contends that the sentence imposed by the jury was excessive, particularly for a first offender. It was stated in Cooper v. United States, 403 F.2d 71 (10th Cir. 1968):

> ....A sentence within the maximum prescribed by law will be deemed to be cruel and unusual only when such a conclusion is clearly required. Hendrick v. United States, 375 F.2d 121 (10th Cir. 1966)....

In Lewis v. State of Oklahoma, 304 F.Supp. 116, 122 (USDC WD Okl. 1969) the Court said:

> ....Where the sentence imposed is within the limits prescribed by the statutes for the offense committed, it ordinarily will not be regarded as cruel and unusual. Edwards v. United States, 206 F.2d 855, at p. 857 (Tenth Cir. 1953).

The Court finds that the sentence imposed was below that sentence requested by the prosecutor and was well within the statutory limits set by the legislature for the crime committed. The Court further finds no constitutional question implicated in the sentence as rendered.

Petitioner next complains of the adequacy of his counsel, alleging counsel waived preliminary hearing, to negotiate a plea for petitioner and failed to do so; that counsel failed to raise the alleged illegal search and seizure; complains of the conduct of counsel during the trial and on appeal. Petitioner's counsel was Court appointed.

In Gillihan v. Rodriguez, 551 F.2d 1182, 1187 (10th Cir. 1977), cert. denied, 434 U.S. 845, 98 S.Ct. 148, 54 L.Ed.2d 111, the Court said:

> "The burden on appellant to establish his claim of ineffective assistance of counsel is heavy. Neither hindsight nor success is the measure for determining adequacy of legal representation." This circuit adheres to the well established principle that relief from a final conviction on the ground of incompetent or ineffictive counsel will be tranted only when the trial was a farce, or a mockery of justice, of was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. (case citations omitted).

The Court, upon consideration of the grounds raised by the petitioner, finds such grounds do not support a finding of ineffective assistance of counsel. The Court, therefore, finds that petitioner was not denied effective assistance of counsel in his state court trial or appeal.

Plaintiff next contends an "illegal search and seizure" in the seizing of a weapon in the vehicle in which he was a passenger. Plaintiff contends that this issue was not raised by his counsel at the time of his trial.

A search of the record reveals that the alleged "illegal search and seizure" has not been raised in any of the State Court proceedings.

In Stone v. Powell, 428 U.S. 465 (1976), the issue was raised in the State Court, and at page 494 the Court concluded:

> In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force.

In Pierce v. State of Okl, 436 F.Supp. 1026, 1028 (USDC WD Okl. 1977), the alleged illegal search and seizure had been treated in state courts at trial, on direct appeal and in proceedings under Oklahoma Post Conviction Procedure Act. The Court found that the federal court need not further consider allegations that the evidence obtained through constitutionally illegal search had been used.

In Johnson v. Meacham, 570 F.2d 918 (10th Cir. 1978), the petitioner had presented his Fourth Amendment claim to the State Supreme Court. The Court said:

> Johnson asserted his claim of an illegal search and seizure on direct appeal to the Wyoming Supreme Court. Johnson v. State, 562 P.2d 1294 (1977). That court framed the issue as follows at 1298:
>
> > "Although in this case no motion to suppress any of these exhibits was made prior to trial, under Rule 40(e)(1), W.R.Cr.P., nor was any objection made upon this basis to the admission of this evidence at the trial, appellant now contends that the court upon its own motion should have inquired of the witnesses and then suppressed exhibits I, III, and IV; and that the failure to do so constituted plain error...."
>
> In determining not to reach the merits of Johnson's Fourth Amendment claim, the Wyoming Supreme Court followed the general rule that ordinarily a claim of an illegal search and seizure cannot be heard on appeal if there was neither a motion to suppress nor an objection to introduction of the evidence at the trial, and stated at 1298:
>
> > "The rule requiring objection at trial is not lightly to be set aside and thus permit a defendant to let in evidence at trial as a hedge to insure reversal on an appeal."
>
> In Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), the Supreme Court held that habeas corpus review of a Fourth Amendment claim is barred where the state has afforded the defendant a full and fair opportunity to litigate that claim....
>
> However, O'Berry v. Wainwright, 546 F.2d 1204, 1216-1218 (5th Cir. 1977), cert. denied, contains a full discussion of this question, the reasoning of which we adopt. That court concluded at 1212

> Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 7 L.Ed.2d 770 (1963) is not the sole appropriate test for determining what "full and fair" consideration means. That court noted that the issue had been exhaustively argued before the state appellate court and that O'Berry made no claim of ineffective assistance of counsel in that regard. Therefore, the court held at 1216 that:
>
> > "The Stone's 'opportunity for full and fair consideration' requirement is satisfied where the state court is squarely faced with petitioner's Fourth Amendment claim, but chooses to resolve that claim on an independent, adequate, non-federal ground, at least where the state ground does not unduly burden federal rights."
>
> Therefore, we hold that where Johnson presented his Fourth Amendment claim to the Wyoming Supreme Court, where the Wyoming Supreme Court applied an adequate procedural ground in refusing to reach the merits of that claim, and where Johnson's claim of ineffective assistance of counsel is not related to this issue, habeas review of the Fourth Amendment claim is barred.

In Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Surpeme Court granted certiorari to consider the availavility "of federal habeas corpus to review a state convict's claim that testimony was admitted at his trial in violation of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), a claim which the Florida courts have previously refused to consider on the merits because of noncompliance with a state contemporaneous objection rule."

In discussing the Wainwright v. Sykes cases, the Tenth Circuit Court of Appeals said in Johnson v. Meacham, supra:

> In connection therewith, Johnson's failure to make a motion to suppress or timely objection at trial amounted to an independent adequate state procedural ground which precludes habeas review. See Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), failure to make a timely objection to the makeup of a grand jury; Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), failure to make a contemporaneous objection to the admission of a confession at trial. In view of the Supreme Court's extensive discussion in Wainwright v. Sykes, supra, its rejection of the sweeping language of Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), which had established the "knowing waiver" or "deliberate bypass" rule, and its detailed reasons for requiring federal courts to recognize state procedural rules, we believe that Sykes is applicable to the failure to move to suppress or object to evidence allegedly obtained in violation of the Fourth Amendment in the present action....

See also Moore v. Cowan, 560 F.2d 1298 (6th Cir. 1977).

The problem facing the Court with the contention raised by the petitioner concerning the alleged "illegal search and seizure" is that this is the first time such contention has been raised. It thus becomes apparent that since he has not raised the search and

search and seizure contention in the State Court, he has not exhausted his State Court remedies as to this alleged error. Staten v. State of Ala., 576 F.2d 654 (5th Cir. 1978); Sneed v. Blackburn, 579 F.2d 854 (5th Cir. 1978); Ennis v. LeFevre, 560 F.2d 1072 (2nd Cir. 1977). But, notwithstanding the failure of the petition to exhaust his State remedies, the Court notes that the record reveals that after his arrest, having been given the Miranda warnings, the petitioner made a statement to the police admitting the robbery. The petitioner was identified by the complaining witness in a line up. The petitioner testified in his own behalf and essentially corroborated the testimony of the State's witnesses. The evidence of guilt is overwhelming in the instant case. The constitutional issue raised by the petitioner as to "illegal search and seizure" is inconsequential, under all of the facts to establish a denial or deprivation of any constitutional right.

IT IS, THEREFORE, ORDERED that the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C.A. §2254, be and the same is hereby denied.

ENTERED this 23rd day of April, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RAYMOND J. KOZICKI, Administrator of the Estate of Raymond Donald Kozicki, individually, and VICKIE RAY KOZICKI, individually, Plaintiffs,	)	
v.	)	No. 77-C-371-C
DR. H. D. HARDY, JR., Defendant.	)	

JUDGMENT

In accordance with the Order of the Court filed this date, Judgment is hereby entered in favor of the plaintiffs, Raymond J. Kozicki in the sum of $5,000.00, Raymond J. Kozicki, Administratror of the Estate of Raymond Donald Kozicki, Deceased, a Minor in the sum of $15,000.00, and Vickie Ray Kozicki in the sum of $10,000.00 together with Plaintiffs' costs in this action.

Dated this 22nd day of April, 1979.

H. Dale Cook
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DECEMBER MASONRY COMPANY, an Oklahoma corporation,

Plaintiff,

v.

BROYLES & BROYLES, INC., a Texas corporation, and THE TRAVELERS INDEMNITY COMPANY, a Connecticut corporation,

Defendants,

and

BALBOA INSURANCE COMPANY, Counterclaim Defendant, and TULLY DUNLAP, JR., Proposed Intervenor,

Additional Parties.

No. 77-C-413

FILED

APR 23 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This cause coming on to be heard on the parties' Stipulation For Dismissal With Prejudice of said cause, and the Court having heard counsel for said parties and being fully advised in the premises,

IT IS HEREBY ORDERED that any and all claims which have been, or might have been, asserted herein by Plaintiff, proposed Intervenor Tully Dunlap, Jr., or Counterclaim Defendant Balboa Insurance Company against the Defendants, and any and all claims which have been or might have been asserted by Defendants against Plaintiff, proposed Intervenor Tully Dunlap, Jr., or Counterclaim Defendant Balboa Insurance Company be, and they hereby are, dismissed with prejudice, each party to bear his own costs.

DATED: April 23rd, 1979.

UNITED STATES DISTRICT COURT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BETTY JEAN SHEPHERD,

Plaintiff,

vs.

PATRICK A. SHARP, individually and in his official capacity as Mayor, City of Collinsville, Oklahoma; M. N. McANALLY, JR., individually and in his official capacity as Commissioner, City of Collinsville, Oklahoma; JOHN PAUL PHILLIPS, individually and in his official capacity as Commissioner, City of Collinsville, Oklahoma; JOHNNIE H. MONTROY, individually and in his official capacity as Commissioner, City of Collinsville, Oklahoma; PRESTON STANLEY, individually and in his official capacity as Commissioner, City of Collinsville, Oklahoma; and R. L. COPPEDGE, individually and in his capacity as Chief of Police, City of Collinsville, Oklahoma,

Defendants.

No. 77-C-397-C

FILED
APR 20 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

J U D G M E N T

The Court on April 20, 1979 filed its Findings of Fact and Conclusions of Law which are hereby incorporated herein and made a part of its Judgment.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that judgment be entered in favor of plaintiff, Betty Jean Shepherd as to her prayer for a hearing to refute charges that may stigmatize her reputation; it is further ordered that judgment be entered in favor of defendants Patrick A. Sharp, M. N. McAnally, Jr., John Paul Phillips, Johnnie H. Montroy, Preston Stanley, R. L. Coppedge, and The City of Collinsville, Oklahoma as to all other requested relief, in light of this Court's Findings of Fact and Conclusions of Law.

It is so Ordered this 20 day of April, 1979.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and CONRAD CARSON, Revenue Officer, Internal Revenue Service, Petitioners, -vs- GLENN O. YOUNG, Respondent.	)	No. 78-C-461-D

ORDER

Upon consideration of the above case which has recently been transferred to the undersigned judge of this Court upon the death of the previously assigned judge, the Court upon its own motion finds that this action should be dismissed as to the remaining issue without prejudice.

In a Decision and Order entered herein on November 7, 1978 the previously assigned judge ruled as follows:

> "The Court finds that the petitioners have not met all four criteria set forth in United States v. Powell, supra, and in particular there has been no showing that the information sought is not already within the possession of the IRS. Furthermore, there is a question in this Court's mind as to whether the summons here involved was in fact properly served.
>
> The Court, therefore, finds that it will not enforce the summons at this time, but will stay this action, at this time, pending further order of this Court."

* * * *

> "IT IS, THEREFORE, ORDERED that the petition to enforce summons is stayed, pending further order of this Court."

It appears to the undersigned judge of this Court that no purpose is served in staying this action as to the issue remaining in the case and that the Decision and Order of the previously assigned judge of this case should now be ripened into an order dismissing this action as to the remaining issue without prejudice to any further proceedings the Petitioners may see fit to initiate under 26 U.S.C. §§7402(b) and 7604.

It is so ordered this 20 day of April, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CARL B. CAGLE,

Plaintiff,

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare,

Defendant.

No. 78-C-141-D

JUDGMENT

This cause having been considered by the Court on the pleadings, the entire record certified to this Court by the Defendant Secretary of Health, Education and Welfare (Secretary), and after due proceedings had, and upon examination of the pleadings and record filed herein, including the Briefs submitted by the parties, the Court is of the opinion as shown by its Memorandum Opinion filed herein of even date that the final decision of the Secretary is supported by substantial evidence as required by the Social Security Act, and should be affirmed.

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that the final decision of the Secretary should be and hereby is affirmed.

Dated this 20 day of April, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CARL B. CAGLE,

Plaintiff,

-vs-

JOSEPH CALIFANO, JR.,
Secretary of Health,
Education and Welfare,

Defendant.

No. 78-C-141-D

FILED

Jack C. Silver, Clerk
U. S. DISTRICT COURT

MEMORANDUM OPINION

Plaintiff, Carl Cagle, brings this action pursuant to 42 U.S.C. §405(g), seeking judicial review of the final administrative decision of the Secretary of Health, Education and Welfare denying Plaintiff's application for disability insurance benefits and supplemental security income benefits under the Social Security Act.

On February 8, 1977, Plaintiff filed an application for disability insurance benefits (Tr. 68-71) and for supplemental security income benefits (Tr. 72-75) alleging that he became unable to work on June 7, 1976.[1/] These applications were denied initially (Tr. 76-77) and on reconsideration (Tr. 79-80, 81-82). Plaintiff then requested a hearing (Tr. 19), and the Administrative Law Judge before whom Plaintiff, his attorney and two witnesses appeared found that Plaintiff was not under a disability and was not entitled to disability insurance benefits or to supplemental security income benefits (Tr. 6-16). The Administrative Law Judge's decision became the final decision of the Defendant when the Appeals Council affirmed it on January 30, 1978 (Tr. 4). Plaintiff then brought the instant action for judicial review.

An applicant for Social Security disability insurance benefits has the burden of establishing that he was disabled on or before the date on which he last met the statutory earnings requirements. McMillin v. Gardner, 384 F.2d 596 (Tenth Cir. 1967); Stevens v. Mathews,

1/ Plaintiff previously filed applications for disability insurance benefits on November 1, 1974 (Tr. 56-59) and August 31, 1976 (Tr. 62-65). Both of these applications were denied initially (Tr. 60-61, 66-67), and Plaintiff apparently took no further action in connection with either application.

418 F.Supp. 881 (W.D. Okla. 1976); Dicks v. Weinberger, 390 F.Supp. 600 (N.D. Okla. 1974); see Johnson v. Finch, 437 F.2d 1321 (Tenth Cir. 1971). For the purposes of Plaintiff's claims, "disability" means inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. §§416(i)(1), 423(d)(1)(a) and 1382c(a)(3)(A). The scope of the Court's review authority is narrowly limited by 42 U.S.C. §405(g). The Secretary's decision must be affirmed if supported by substantial evidence. Gardner v. Bishop, 362 F.2d 917 (Tenth Cir. 1966); Stevens v. Mathews, supra. Substantial evidence is more than a scintilla. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); Stevens v. Mathews, supra. However, substantial evidence is less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Consolo v. Federal Maritime Commission, 383 U.S. 607, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966); Stevens v. Mathews, supra.

In conducting this judicial review, it is the duty of this Court to examine the facts contained in the record, evaluate the conflicts and make a determination therefrom whether the facts support the several elements which make up the ultimate administrative decision. Heber Valley Milk Co. v. Butz, 503 F.2d 96 (Tenth Cir. 1974); Nickol v. United States, 501 F.2d 1389 (Tenth Cir. 1974); Stevens v. Mathews, supra. In this case, the ultimate administrative decision is evidenced by the findings of the Administrative Law Judge before whom Plaintiff appeared. Those findings were as follows (Tr. 15-16):

1. Claimant stated he was born January 24, 1935, completed the twelfth grade and received training in the Air Force as a jet engine mechanic, and has worked as a welder since 1961.

2. Claimant met the special earnings requirements of the Act for disability purposes in April 1974

and June 1976, the alleged date of disability onset, and continues to meet said requirements through the date of this decision.

3. The claimant had a laminectomy and lumbosacral fusion with discectomy L5-S1 and subsequently exploratory surgery which showed the fusion to be solid.

4. The claimant suffers from low back pain and left sciatic, secondary to nerve root adhesions, a hiatal hernia with reflux esophagitis, and anxiety reaction and depression.

5. A vocational expert noted jobs which exist in substantial numbers in the area where claimant resides and which would be within claimant's vocational and physical competence.

6. The claimant has not been prevented from engaging in all substantial gainful activity for any continuous period beginning on or before the date of this decision which has lasted or could be expected to last for at least 12 months.

7. The claimant was not under a disability, as defined by the Social Security Act, as amended, at any time prior to the date of this decision.

The elements of proof which should be considered in determining whether Plaintiff has established a disability within the meaning of the Act are: (1) objective medical facts; (2) medical opinions; (3) subjective evidence of pain and disability; and (4) the claimant's age, education and work experience. Hicks v. Gardner, 393 F.2d 299 (Fourth Cir. 1968); Stevens v. Mathews, supra; Morgan v. Gardner, 254 F.Supp. 977 (N.D. Okla. 1966). The evidence in the record before the Court will be summarized below:

MEDICAL EVIDENCE

Plaintiff was examined on May 8, 1974, by Dr. James E. Winslow, Jr., an orthopedic surgeon (Tr. 175). Plaintiff presented a history of progressively worsening pain in the lumbar spine over a period of about one year. X-rays revealed a significant lumbar spondylosis at L5-S1; there was also minimal evidence of radiculopathy. A lumbosacral support was prescribed for the Plaintiff, along with a gentle exercise program of trunk flexion exercises (Tr. 135).

On May 28, 1974, Plaintiff was again seen by Dr. Winslow. At this time Plaintiff's condition had not been improved by the support,

and he was not benefiting from the exercise program (Tr. 139). Subsequently, Plaintiff entered St. Francis Hospital, Tulsa, Oklahoma, where he ultimately underwent a laminectomy and lumbosacral fusion with discectomy at L5-S1. The final diagnosis had been lumbar spondylosis with a herniated nucleus pulposus, L5-S1. Plaintiff's course of recovery was satisfactory, and he was discharged in satisfactory condition on August 8, 1974 (Tr. 132-134, 139).

Plaintiff returned for a postoperative evaluation in September of 1974 (Tr. 137-138). At this time Plaintiff complained of pain in his back and legs. No numbness, weakness or atrophy of the legs was discovered, and X-rays showed that the bone grafts were properly aligned. Dr. Winslow, in his notes of September 12, 1974, stated: "I really cannot medically explain completely the findings in the patient's pain at this point" (Tr. 138).

Plaintiff returned again in October and November of 1974, still complaining of back pain (Tr. 136-138). A myelogram performed by Dr. Coates showed the usual postoperative appearance. Plaintiff was feeling better at this time, and Dr. Winslow noted that Plaintiff "probably could return to work on a limited basis if he did no heavy lifting and limits the amount of climbing he does" (Tr. 136).

Plaintiff again saw Dr. Winslow on December 27, 1974 (Tr. 143-144). At this time, Dr. Winslow noted that Plaintiff's back was doing much better, but that Plaintiff had slipped at work a few weeks earlier, injuring his left knee. An arthrotomy was performed in early January, 1975, Plaintiff's progress was satisfactory, and by February 28, 1975, Plaintiff was carrying on normal activities with only minimal symptoms present. Dr. Winslow opined that Plaintiff suffered a ten percent partial permanent impairment to his left leg (Tr. 143-146).

On May 26, 1976, Plaintiff entered the Veterans Administration Hospital in Fayetteville, Arkansas, complaining of pain in his lower back, radiating into both hips. Plaintiff was examined, and treated conservatively by bedrest, medication and physical therapy. Plaintiff was discharged as improved on June 8, 1976, however, his hospital

summary indicated that Plaintiff was "very doubtful of his ability to resume employment, anticipating recurrence of his complaints and wishing referral to the Neurosurgery Dept. in Oklahoma City VAH" (Tr. 147).

Plaintiff was examined by Dr. J. Peter Beck, an orthopedic surgeon (Tr. 173), on October 13, 1976 (Tr. 161-162). Dr. Beck noted a loss of lumbar lordosis with minor muscle spasm and a 50% of normal range of motion with pain on lateral bending in extension and forward flexion. X-rays showed no motion at the L-5, S-1 levels in flexion and extension laterals but showed possible pseudarthrosis. Dr. Beck concluded that transcutaneous nerve stimulation should be tried on Plaintiff and recommended a repeat myelography and electromyogram before any further surgery.

Plaintiff returned to St. Francis Hospital on November 2, 1976, for a follow-up evaluation of low back pain and left sciatica. Another myelogram was done, which showed some scar tissue formation about the S-1 nerve root sleeve on the left side; there was no evidence of a ruptured disc, and Plaintiff was discharged on November 5, 1976, after receiving symptomatic supportive treatment (Tr. 166-168).

Tomograms were done in December of 1976, in order to eliminate the possibility of pseudarthrosis (Tr. 164). Dr. Beck reported that the tomograms showed an apparent solid union of the lateral fusion masses (Tr. 164). Plaintiff was, however, admitted to St. Francis Hospital on January 27, 1977, for surgical exploration of the fusion mass (Tr. 169). Surgery showed the fusion mass to be solid, and Plaintiff was discharged after recovery (Tr. 169-170).

Plaintiff was hospitalized at the VA Hospital in Fayetteville, Arkansas, on February 28, 1977, complaining of fullness, tightness and gas in the upper abdomen, possibly related to a hiatal hernia he was known to have (Tr. 182). Plaintiff's vital signs were normal at this time, as were laboratory tests. Although Plaintiff had not yet had X-rays of the lumbosacral region taken, he became upset, nervous and irritable, and asked to be discharged before the tests could be completed. According to the hospital summary, the diagnoses

were: "(1) Hiatal hernia, by history and recent symptoms, not confirmed at present time; (2) Lumbo-sacral discogenic disease and two surgical procedures, a recent on 1/19/77; and (3) Anxiety and depression" (Tr. 182).

Dr. James H. Bearden, a gastroenterologist (Tr. 186), saw Plaintiff on June 3, 1977, at which time esophagogastroduodenoscopy was performed (Tr. 183-186). Plaintiff was found by Dr. Bearden to be suffering from reflux esophagitis and nonspecific duodenitis (Tr. 184). Dr. Bearden, in his report, noted: "I don't think we are ever going to get satisfactory relief from [sic] this gentleman until he finds some occupation and can start earning a living again. He feels terrible about not being able to work and I, of course, encouraged him to pursue some form of retraining" (Tr. 185).

In a letter dated June 9, 1977 (Tr. 180), Dr. R. H. Bortz, a general practitioner and surgeon (Tr. 174), summarized Plaintiff's medical history and present condition. Dr. Bortz noted that Plaintiff had a good deal of hiatal reflux and was having progressive difficulty getting about. Dr. Bortz concluded:

> At least during the past full year, [Plaintiff] has been virtually 100% debilitated by pain and difficulty in getting about. I feel that his pain is probably not going to resolve itself at this time and will probably tend to have remissions and exacerbations with progressive debilitation for the rest of his life. At the present time, I suggest that he is 25% to 50% disabled depending upon the severity of his problem. As far as physical labor and activity goes, his disability is 75% to 100%.

Dr. Bortz supplemented the above letter with a letter dated September 26, 1977 (Tr. 181) wherein he updated Plaintiff's medical history and noted that Plaintiff's disability was the same as stated in the letter of June 9, 1977.

SUBJECTIVE EVIDENCE

In his application for disability insurance benefits of February 8, 1977, Plaintiff describes his disability as "back and leg trouble" (Tr. 68).

At the administrative hearing held on September 28, 1977 (Tr. 20-55), Plaintiff testified that he was always in pain (Tr. 44),

and that his pain prevented him from climbing or crawling in the positions necessary to perform his former work (Tr. 32-33). Plaintiff also testified that he rises early because the pain prevents him from lying down (Tr. 33), that he sometimes wears a back brace (Tr. 39), that his knee sometimes pains him and "gives out" (Tr. 40-41), and that his hiatal hernia causes bloating and radiating chest pains (Tr. 35). Plaintiff testified he regularly performs exercises for his back (Tr. 39) and takes medication for pain, nerves and stomach problems, in addition to being on a bland diet (Tr. 34-44).

Plaintiff's wife testified that Plaintiff's left leg will go out from under him unexpectedly (Tr. 42), and that Plaintiff is unable to sit in one position for any length of time without moving around or walking a bit (Tr. 53).

VOCATIONAL EXPERT

At the administrative hearing, Dr. Minor W. Gordon, a psychologist experienced in vocational psychological evaluation and counseling (Tr. 178-179), testified as a vocational expert. Dr. Gordon testified that Plaintiff would be capable of performing light jobs or sedentary jobs. Examples of such jobs would be assembly of electronic circuits and assembly of gauging instruments, which jobs, Dr. Gordon testified, exist in significant numbers in the area of Plaintiff's residence (Tr. 45-52).

VOCATIONAL DATA

At the administrative hearing, Plaintiff testified that he was 42 years old and had finished high school in addition to having had special training in the Air Force as a mechanic (Tr. 27). Plaintiff also testified that he had worked for a short time for an airline and for a trailer manufacturing company, and that he was able to read blueprints (Tr. 32). Plaintiff's primary work experience, however, had been as a welder, work he testified he had been performing since 1961 (Tr. 32).

CONCLUSION

The final administrative conclusion in this case was that although Plaintiff suffers from low back pain and left sciatic, secondary to nerve root adhesions, a hiatal hernia with reflux esophagitis, and anxiety and depression, he fails to meet the disability requirements of Titles II and XVI of the Social Security Act. The medical reports and hospital records in the administrative record show that Plaintiff's surgical procedures progressed as expected and that Plaintiff was encouraged by his physicians to seek retraining and return to some type of light work, although Dr. Bortz did estimate Plaintiff's disability to be 75% to 100%. While Dr. Bortz's opinion is entitled to great weight, the ultimate conclusion as to disability rests with the Secretary and must be made on the basis of the entire record. Harris v. Mathews, 430 F.Supp. 1335 (D. Md. 1977). Moreover, the duty to resolve conflicts in the evidence is the task of the Secretary and not of a reviewing Court. Richardson v. Perales, supra; Sullivan v. Weinberger, 493 F.2d 855 (Fifth Cir. 1974), cert. denied, 421 U.S. 967, 95 S.Ct. 1958, 44 L.Ed.2d 455 (1975); Payne v. Weinberger, 480 F.2d 1006 (Fifth Cir. 1973); Grant v. Richardson, 445 F.2d 656 (Fifth Cir. 1971); Mayhue v. Gardner, 294 F.Supp. 853 (D. Kan. 1968), aff'd, 416 F.2d 1257 (Tenth Cir. 1969).

In the instant case, the opinion of Dr. Bortz was given serious consideration by the Administrative Law Judge who rejected the same and drew his own conclusions as to Plaintiff's disability from all of the evidence before him. In this connection, the record reveals that none of the other doctors who examined Plaintiff expressed an opinion that Plaintiff was disabled. Furthermore, Dr. Gordon, the vocational expert, stated that there were numerous jobs available which could be performed by an individual in Plaintiff's condition. Therefore, as it appears that the Administrative Law Judge fully considered Plaintiff's medical history, present mental and physical condition, age, educational and vocational background, and the subjective evidence of pain and disability in reaching the administrative

decision herein, the Court finds and concludes after reviewing the administrative record before it that the Secretary's decision is supported by substantial evidence and should be affirmed. Accordingly, a Judgment of affirmance will be entered this date.

It is so ordered this 20 day of April, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRANK B. ZINN,

Plaintiff,

v.

JOSEPH A. CALIFANO, JR., Secretary, United States Department of Health, Education and Welfare,

Defendant.

No. 78-C-345-D

O R D E R

This is an action to review a final decision of the Secretary of Health, Education and Welfare, pursuant to 42 U.S.C. § 405(g). Plaintiff's counsel was granted leave of this Court to withdraw on March 16, 1979, at which time Plaintiff was granted 20 days in which to obtain entry of other counsel. Plaintiff has not obtained the entry of other counsel, filed a pro se statement, nor requested an extension of time.

Inherent in the power of federal courts is the power to control their dockets. Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972); see Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). Therefore, in appropriate circumstances, a district court may dismiss a complaint on the Court's own motion. Diaz v. Stathis, 440 F.Supp. 634 (D.C.Mass. 1977), aff'd, 576 F.2d 9 (1st Cir. 1978); see Literature, Inc. v. Quinn, 482 F.2d 372 (1st Cir. 1973); see, e.g., Maddox v. Shroyer, 302 F.2d 903 (D.C. Cir. 1962), cert. denied, 371 U.S. 825, 83 S.Ct. 45, 9 L.Ed.2d 64 (1962).

In the instant case, Plaintiff has failed to comply with the Court's order of March 16, 1979. Failure to comply with said Order is not a matter that goes to the merits of Plaintiff's Complaint itself and thus does not require dismissal of Plaintiff's action. See Petty v. Manpower, Inc., _____ F.2d _____ (10th Cir. 1979).

Accordingly, the Court finds and concludes that Plaintiff's Complaint should be dismissed without prejudice for failure to comply with the Court's Order. See Maddox v. Shroyer, supra.

IT IS THEREFORE ORDERED that Plaintiff's Complaint be and is hereby dismissed without prejudice.

It is so Ordered this 12th day of April, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BRIAN DENNIS HUNT,

Plaintiff,

vs.

NUCLEAR REGULATORY COMMISSION, an agency of the United States, and SHELDON WOLFE, M. FREDERICK SHON and DR. PAUL W. PURDOM, individually and as members of the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission,

Defendants,

GENERAL ELECTRIC COMPANY, a New York corporation,

Intervening Defendant,

PUBLIC SERVICE COMPANY OF OKLAHOMA,

Intervening Defendant.

No. 79-C-122-C

FILED

APR 19 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The above-captioned action is brought pursuant to the provisions of the Government in the Sunshine Act (Sunshine Act), 5 U.S.C. § 552b. The plaintiff alleges that certain in camera hearing sessions in the construction permit adjudicatory proceedings for the Black Fox nuclear power station should have been opened to the public under the Sunshine Act. He prays that the Court issue preliminary and permanent injunctions prohibiting the defendant Nuclear Regulatory Commission's (NRC) Atomic Safety and Licensing Board (ASLB) from conducting the subject hearing sessions in camera, and for such further relief as the Court may deem proper. The defendant NRC has moved the Court to dismiss plaintiff's Complaint. The intervenors, General Electric Company (GE) and Public Service Company of Oklahoma (PSO), support the NRC's Motion to Dismiss.

The in camera hearing sessions objected to by the

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plaintiff had as their subject matter the so-called "Reed Report". The Reed Report is a study on the subject of GE's Boiling Water Reactor Nuclear Steam Supply System which was prepared under the direction and supervision of Dr. Charles Reed, a GE employee, in 1975. GE's Nuclear Steam Supply System is to be a component of PSO's Black Fox nuclear power plant located near Inola, Oklahoma.

Over the past several months, the ASLB has conducted hearings with respect to the licensing of the Black Fox plant. On October 18, 1978, at the request of the intervenor in the Black Fox proceedings, Citizens' Action for Safe Energy, the ASLB issued a subpoena duces tecum to GE requesting production of the Reed Report. The Reed Report was eventually made available for certain limited purposes and subject to a protective order. Each of the parties in the Black Fox proceedings subsequently executed an "Agreement Regarding Disclosure of Confidential Information" where they agreed, among other things, that the information from the Reed Report would be presented only during in camera sessions before the ASLB. These in camera sessions were scheduled for March 1-3, 1979. The Black Fox licensing proceedings, including the in camera hearings on the Reed Report, were concluded on February 28, 1979.

Mootness

On February 22, 1979, the Court heard and denied plaintiff's application for a temporary restraining order prohibiting the in camera hearings on the Reed Report. At the conclusion of that hearing, it became apparent that the crux of this matter was whether the Sunshine Act applied to the Black Fox hearings. This is the principal ground raised by the NRC in its Motion to Dismiss. The Court indicated that if the Sunshine Act were applicable, the plaintiff would be entitled to relief. The case was submitted to the Court on the merits of that issue.

However, upon reviewing the Complaint, the Court became concerned that the conclusion of the hearings had rendered this case moot. The plaintiff is asking that the Court enjoin proceedings that have been concluded. This concern was expressed to the parties. The defendants contend that this case is moot. The plaintiff, of course disagrees. On the other hand, all the parties also seem to desire a disposition of this case on its merits.

This case presents matters which are of great public interest and importance. The proliferation of nuclear power is inevitable, as is the public debate over its safety and feasibility. As in the instant case, the public will certainly continue to demand access to the decision-making process. Under these circumstances, a decision on the merits is not only desirable, but it is also entirely proper.

The cessation of allegedly illegal acts may determine the appropriateness of injunctive relief from those acts, but it will not make the case moot. See United States v. W. T. Grant Co., 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953).

> "A controversy may remain to be settled in such circumstances, . . . e.g., a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . ." (Footnotes and citations omitted) Id. at p.632. See also Allee v. Medrano, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 612 (1974).

Facts such as those of the case at bar which are "'capable of repetition, yet evading review'", Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), justify a conclusion of nonmootness.

The legality of the ASLB's in camera sessions remains a live issue. As the Court has indicated, if the Sunshine Act applies, the holding of in camera hearings on the Reed Report was illegal and the plaintiff is entitled to relief.

The Sunshine Act would not limit the plaintiff to the now inappropriate injunctive relief. The Court may grant "such equitable relief as it deems appropriate, including . . . ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld . . ." 5 U.S.C. § 552b(h)(1).

The Court's conclusion that the cessation of the subject hearings does not moot this case is reinforced by the provisions of the Sunshine Act. Section 552b(h)(1) allows the bringing of an action to enforce the open meeting provisions up to sixty days after the meeting out of which the alleged violation arose.

The Merits

The Sunshine Act requires that "[m]embers shall not jointly conduct or dispose of agency business other than in accordance with this section. . . . [E]very portion of every meeting of an agency shall be open to public observation." 5 U.S.C. § 552b(b). The terms "agency", "meeting", and "member" are limited in meaning.

> "For purposes of this section --
> (1) the term 'agency' means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;
> (2) the term 'meeting' means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and
> (3) the term 'member' means an individual who belongs to a collegial body heading an agency." 5 U.S.C. § 552b(a).

It is clear that the Sunshine Act applies to the deliberations of the collegial body heading the agency, in this case, the NRC. But the term "agency" also refers to "any subdivision thereof authorized to act on behalf of the agency." An ASLB is authorized to act on behalf of the NRC

under certain circumstances. 10 C.F.R. §§ 1.11, 2.721. However, there are no agency "members" on an ASLB. 42 U.S.C. § 2241(b). The Sunshine Act and its legislative history demonstrate that a board or panel without "members" is not a "subdivision" of an agency under the Sunshine Act.

If such boards or panels were meant to be covered, the "meeting" requirement would have to be ignored. The Sunshine Act requires that "meetings" be open to the public and meetings are deliberations of members.

The House Report on the Sunshine Act explains the "subdivision" language as follows:

> "The term 'agency' includes . . . (2) any subdivision thereof authorized to act on behalf of the agency (without regard to the number of members composing or included in the subdivision) . . .
>
> A subdivision of an agency covered under section 552b is covered if it is authorized to act on behalf of the agency. Panels, or regional boards of an agency are covered if authorized to act on behalf of the agency, even if their action is not final in nature. Thus, panels or boards authorized to submit recommendations, preliminary decisions or the like to the full commission, or to conduct hearings on behalf of the agency are required to comply with the provisions of section 552b." (Emphasis added) 1976 U.S. Code Cong. & Ad. News, 2183, 2189.

The House of Representatives apparently contemplated that some number of members less than the "full commission" would be included in the agency subdivisions covered by the Sunshine Act.

The Senate Report is more explicit.

> "Section 201(a) provides that all meetings of the individual Commissioners, board members, or the like, except those discussions exempted by subsection (b), must be open to the public. Included within this requirement are meetings of agency subdivisions authorized to take action on behalf of the agency. The open meeting requirement applies to panels of a Commission, or regional boards, consisting of two or more agency heads and authorized to take action on behalf of the agency. To be a subdivision of an agency covered by this subsection, the panel need not have authority to take agency action which is final in nature.

> Panels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency, are required by the subsection to open their meetings to the public." S.Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975).

The location of the word "subdivision" was different in the House and Senate versions of the Sunshine Act. See H.Rep. No. 94-880, Part I, 94th Cong., 2nd Sess. 25 (1976); S.Rep. No. 94-354, 94th Cong., 1st Sess. 56 (1975). The Senate version read in pertinent part as follows:

> "Except as provided in subsection (b), all meetings of such collegial body, or of a subdivision thereof authorized to take action on behalf of the agency, shall be open to the public. . . ."

The pertinent House amendments were adopted by the committee of conference on the disagreeing votes of the two Houses and were eventually signed into law. There the word "subdivision" is contained in the definition of agency. It is clear from the Conferance Report that the adoption of the House Amendments was not meant to effect any substantive change in the law. 1976 U.S. Code Cong. & Ad. News, 2183, 2246-47.

The Court must therefore conclude that the Sunshine Act did not apply to the ASLB Black Fox hearings. The Court is aware of only one prior instance where a court has had occasion to interpret the subject provisions of the Sunshine Act. Judge Fullam of the United States District Court for the Eastern District of Pennsylvania issued a bench opinion in Philadelphia Newspapers, Inc. v. U. S. Parole Comm'n, No. 78-1016 (E.D.Pa. Mar. 30, 1978), in which he held that proceedings before hearing examiners who were not members of the Parole Commission were not subject to the provisions of the Sunshine Act. Judge Fullam reasoned as follows:

> "The Sunshine Act obviously would apply to the meetings of the Parole Commission itself and very clearly, to my mind, does not apply to proceedings before persons who are not members of the Parole Commission and whose decisions or deliberations do not result in

action by the Parole Commission.

> Specifically Section 552b, Subsection (a)(2) says: '. . . the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business. . . .'
>
> Subsection (3) of that section says: '. . . the term "member" means an individual who belongs to a collegial body heading an agency.'
>
> Therefore, it is clear to me the proceedings before a hearing examiner or hearing examiners who are not members of the Parole Commission can not possibly constitute a meeting within that terminology.
>
> This is fortified by the observation of Subsection (b) of Section 552b that specifically says only that 'members shall not jointly conduct or dispose of agency business other than in accordance with this section.' I need not explore the question of the possible right of a covered agency to determine that opening the meeting would not be appropriate.
>
> Therefore, I conclude that plaintiffs do not have any basis for proceeding under the Sunshine law." Id. at pp. 3,4.

The plaintiff has submitted a partial transcript of a hearing before the Nuclear Regulatory Commission's Advisory Committee on Reactor Safeguards (ACRS), which hearing was opened to the public pursuant to the provisions of the Federal Advisory Committee Act and the Sunshine Act. The plaintiff contends that this material demonstrates the inconsistency of the NRC's position that the Black Fox hearings are not subject to the provisions of the Sunshine Act, since the ACRS and an ASLB occupy similar positions in the NRC organization. This contention lacks merit.

The ACRS is an "advisory committee" subject to the provisions of the Federal Advisory Committee Act, 5 U.S.C., App. 1 §§ 1-15. Section 10 of that Act requires that advisory committee meetings be open to the public, 5 U.S.C., App. 1 § 10(a)(1), and the provisions of the Sunshine Act for closing meetings are expressly made applicable to meetings of advisory committees. 5 U.S.C., App. 1 § 10(d). This accounts for

the committee's announcement that the meeting was being conducted in accordance with the provisions of the Federal Advisory Committee Act and the Sunshine Act. It does not appear to the Court that an ASLB is an "advisory committee" within the contemplation of the Act. 5 U.S.C. App. 1, §§ 3,9. See Union of Concerned Scientists v. Atomic Energy Comm'n, 499 F.2d 1069 (D.C.Cir. 1974).

For the foregoing reasons, it is therefore ordered that the defendant NRC's Motion to Dismiss is hereby sustained.

It is so Ordered this 19th day of April, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ADOLPH CRISP,

Plaintiff,

-vs-

C. L. LEWIS, R. E. CARTNER, JR. THE CITY OF TULSA Tulsa, Oklahoma, and JACK PURDIE, Chief of Police, Tulsa, Oklahoma.

Defendants

No. 76-C-571-B

FILED

APR 19 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This matter comes on for hearing this 19th day of April, 1979, upon the application of the plaintiff, Adolph Crisp, to dismiss this cause of action on the basis that the cause of action is moot as having been settled between the parties.

For good cause shown, IT IS THEREFORE ORDERED AND ADJUDGED that the cause of action be, and it is hereby dismissed with prejudice for the bringing of any future cause of action on the basis that the cause of action between the parties has been settled.

Judge

APPROVED AS TO FORM:

s/ Don E. Gasaway
Don E. Gasaway, Attorney for Plaintiff,

s/ David Pauling
David Pauling, Assistant City Attorney, Attorneys for Defendant.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRANK B. ZINN,

Plaintiff,

v.

DAVID S. MATTHEWS, Secretary, United States Department of Health, Education and Welfare

Defendant.

No. 76-C-532-D

O R D E R

This is an action to review a final decision of the Secretary of Health, Education and Welfare, pursuant to 42 U.S.C. § 405(g). Plaintiff's counsel was granted leave of this Court to withdraw on March 16, 1979, at which time Plaintiff was granted 20 days in which to obtain entry of other counsel. Plaintiff has not obtained the entry of other counsel, filed a pro se statement, nor requested an extension of time.

Inherent in the power of federal courts is the power to control their dockets. Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972); see Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). Therefore, in appropriate circumstances, a district court may dismiss a complaint on the Court's own motion. Diaz v. Stathis, 440 F.Supp. 634 (D.C.Mass. 1977), aff'd, 576 F.2d 9 (1st Cir. 1978); see Literature, Inc. v. Quinn, 482 F.2d 372 (1st Cir. 1973); see, e.g., Maddox v. Shroyer, 302 F.2d 903 (D.C. Cir. 1962), cert. denied, 371 U.S. 825, 83 S.Ct. 45, 9 L.Ed.2d 64 (1962).

In the instant case, Plaintiff has failed to comply with the Court's order of March 16, 1979. Failure to comply with said Order is not a matter that goes to the merits of Plaintiff's Complaint itself and thus does not require dismissal of Plaintiff's action. See Petty v. Manpower, Inc., _____ F.2d _____ (10th Cir. 1979).

Accordingly, the Court finds and concludes that Plaintiff's Complaint should be dismissed without prejudice for failure to comply with the Court's Order. See Maddox v. Shroyer, supra.

IT IS THEREFORE ORDERED that Plaintiff's Complaint be and is hereby dismissed without prejudice.

It is so Ordered this 12 day of April, 1979.

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DOROTHY M. WILLIAMS,

Plaintiff,

vs.

THE FIRST NATIONAL BANK & TRUST CO. OF TULSA,

Defendant.

No. 77-C-352-B

FILED
APR 19 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Pursuant to the Stipulation of Dismissal filed by the parties hereto and for good cause shown, all claims presented by the Complaint filed in the above-entitled action are hereby dismissed with prejudice. Each party shall bear her or its own costs and attorneys' fees.

ENTERED this 19 day of April, 1979.

Fred Daugherty
United States District Judge

16

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNIT RIG AND EQUIPMENT COMPANY,

Plaintiff,

vs.

LOCAL 790 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, a labor organization, and HERBERT HOWARD, an individual,

Defendants.

77-C-411-C

JUDGMENT

Pursuant to the Order filed simultaneously this date,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the plaintiff, Unit Rig and Equipment Company, vacating and not enforcing the Award of the Arbitrator rendered herein, insofar as it relates to Article 8, Section 16; the rest of said award to remain in full force and effect. IT IS ORDERED that Judgment be entered against the defendants, Local 790 of the International Association of Machinists and Aerospace Workers, a labor organization, and Herbert Howard, an individual.

ENTERED this 19th day of April, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

In the Matter of the Application of MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. to Compel Arbitration, pursuant to the United States Arbitration Act, Title 9 U.S.A. §4, Petitioner, against MILTON M. MOORE and SUE KENDALL MOORE, Respondents.	No. 76-C-145-C

FILED

APR 19 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT ON MANDATE

On this 19th day of April, 1979, the Court, having considered the mandate and opinion of the U. S. Court of Appeals for the Tenth Circuit, dated February 5, 1979, reversing and remanding this cause to this Court with directions to proceed in accordance with the views expressed therein, finds that this action should be dismissed on the merits.

IT IS THEREFORE ORDERED that this action be dismissed on the merits.

H. DALE COOK
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America, Plaintiff, vs. 40.00 Acres of Land, More or Less, Situate in Osage County, State of Oklahoma, and Lewis J. Rutherford, et al., and Unknown Owners, Defendants.	)	CIVIL ACTION NO. 78-C-617-C Tract No. 203

JUDGMENT

1.

NOW, on this 19th day of April, 1979, this matter comes on for disposition on application of the Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tract No. 203, as such estate and tract are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause who are interested in subject property.

5.

The Acts of Congress set out in paragraph 2 of the Complaint herein give the United States of America the right, power and authority to condemn for public use the property described in such Complaint. Pursuant thereto, on December 18, 1978,

the United States of America filed its Declaration of Taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing the Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of this Court, as estimated compensation for the taking of a certain estate in subject tract a certain sum of money, and all of this deposit has been disbursed, as set out below in paragraph 16.

7.

The defendants named in paragraph 16 as owners of the estate taken in subject tract are the only defendants asserting ownership of such property. The other defendants named in such paragraph, held a real estate mortgage on the subject tract on the date of taking. All other defendants having either disclaimed or defaulted, the named defendants, as of the date of taking were the owners and mortgagees of the estate condemned herein, and as such, are entitled to receive the just compensation awarded by this judgment.

8.

On March 16, 1979, a Stipulation, executed by the former owners of the estate taken in subject tract, and the United States of America, was filed herein, whereby all improvements situated upon the subject tract on the date of taking herein, were excluded from the taking and title thereto was revested in the former owners. Such exclusion of property should be approved by the Court.

9.

The Stipulation described in paragraph 8 above also contained a stipulation as to the amount of just compensation for the estate condemned in the subject tract and as to the manner in which such award should be allocated among the defendants. Such stipulation as to compensation should be approved by the Court.

10.

On March 19, 1979, a Disclaimer, executed by the former mortgagees of the subject property, was filed herein, whereby such defendants acknowledged receipt, from the deposit made in this case, of the entire amount due on their mortgage and waived any claim for further compensation in this case. Such Disclaimer should be approved by the Court.

11.

This judgment will create a deficiency between the amount deposited as estimated compensation for the estate taken in subject tract and the amount fixed by the Stipulation As to Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owners. Such deficiency is set out in paragraph 16 below.

12.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use the tract designated as Tract No. 203, as such tract is particularly described in the Complaint filed herein; and such tract, to the extent of the estate described in such Complaint (but subject to the exclusion provided below in paragraph 14) was condemned, and title thereto vested in the United States of America as of December 18, 1978, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim (except as to such excluded property) to such estate.

13.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the estate condemned herein in subject tract were the parties whose names appear below in paragraph 16, and the interest of each party was as therein indicated; and the right to receive the just compensation awarded by this judgment is vested in the parties so named.

14.

It Is Further ORDERED, ADJUDGED and DECREED that the agreement of the former owners and the Plaintiff, regarding exclu-

sion of certain property from the taking in this case, as set forth in the Stipulation (described in paragraph 8 above) filed herein on March 16, 1979 hereby is approved.

15.

It Is Further ORDERED, ADJUDGED and DECREED that the Disclaimer of the former mortgagees of the subject tract, described above in paragraph 10, hereby is approved.

16.

It Is Further ORDERED, ADJUDGED and DECREED that the agreement as to just compensation, described in paragraph 9 above, hereby is approved and the amount therein fixed by the parties is adopted by the Court as the award of just compensation for the estate taken in the subject tract in this case, as shown in the schedule which follows, to-wit:

TRACT NO. 203

Owners:

Lewis J. Rutherford and
Delfina M. Rutherford

Subject to a mortgage owned by:

Gerald W. DeWalt and
Ica I. DeWalt

Award of Just Compensation
pursuant to Stipulation ---------- $70,000.00

Deposited as estimated compensation ---------- $56,525.00

Deposit deficiency ---------- $13,475.00

Allocation of award and disbursals:

Allocated:

To Rutherfords ------- $59,353.94
To DeWalts ---------- $10,646.06

Disbursed:

To Rutherfords -------- $45,878.94
To DeWalts ---------- $10,646.06

Balance due:

To Rutherfords -------- $13,475.00
To DeWalts ---------- None

17.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tract, the deposit deficiency in the sum of $13,475.00, and the Clerk of this Court then shall disburse the deposit for such tract as follows:

To - Lewis J. Rutherford and

Delfina M. Rutherford, jointly ---- $13,475.00.

UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT A. MARLOW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

POWELL ENTERPRISES, INCORPORATED,
d/b/a POWELL CONSTRUCTION COMPANY,
a corporation,

Plaintiff,

vs.

SKAGGS SUPERCENTERS, INC.,
a Texas Corporation,

Defendant.

78-C-244-C

FILED

MAR 19 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

On March 15, 1979, this Court entered an Order dismissing the cause of action and complaint filed in the instant litigation.

On March 20, 1979, the plaintiff filed a Motion for Relief Under Rules 59 and 60, and for Leave to Amend Under Rule 15. The Court has carefully perused the brief submitted by the plaintiff and the response submitted by the defendant and the Motion is now ready for dispositive ruling.

In the Motion, plaintiff states:

> In the Court's Order of March 15, 1979, the Court adverts to the fact that Plaintiff's Complaint contains two causes of action, the first being a cause of action for declaratory judgment, and the second cause of action..."seeks recovery for all work performed, damages, including a reasonable profit, etc., which Powell would be entitled to if the Court determines that Powell was legally justified in terminating the Contract."
>
> The Court found that the action for declaratory relief failed to state a claim upon which relief might be granted, and ordered that..."this cause of action and Complaint be and the same are hereby dismissed.

Plaintiff then assumes that the Court "only intended to dismiss the cause of action for declaratory relief, and to leave pending, to be adjudicated in due course, the second cause of action for damages." Plaintiff states that if this be the case, that pursuant to Rule 59(e) and Rule 60(a), the Court should alter, amend and correct its Order of March 15, 1979, to so state.

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The Court is of the opinion that the March 15, 1979 Order is clear on its face. It was the opinion of the Court, at the time the case was reviewed that the First Cause of Action failed to state a claim and should be dismissed. It also was the opinion of the Court that the second cause of action was contingent upon plaintiff prevailing on the first cause of action. The Court, therefore, dismissed the First Cause of Action and the entire Complaint, such order being dispositive of the law suit in the posture it maintained before the Court at that time.

The Court, therefore, finds that the Motion for Relief under Rules 59 and 60 filed by plaintiff, being a request for the Court to alter, amend and correct its Order of March 15, 1979, be denied and overruled.

Turning to the plaintiff's Motion to Amend pursuant to Rule 15 of the Federal Rules of Civil Procedure. In Wright & Miller, Federal Practice, Vol. 6, ¶1489 it is stated:

> Although Rule 15(a) vests the district judge with virtually unlimited discretion to allow amendments by stating that leave to amend may be granted when "justice so requires", there is a question concering the extent of this power once a judgment has been entered or an appeal has been taken. Most courts faced with the problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60. The party may move to alter or amend the judgment within ten days after its entry under Rule 59(e) or, if the motion is made after that ten day period has expired, it must be made under the provisions in Rule 60(b) for relief from a judgment or order....To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation....

The Court has not altered or amended the judgment and order entered herein, therefore, the Motion to Amend has not been properly presented to the Court for consideration.

IT IS, THEREFORE, ORDERED that the Motion for Relief Under Rules 59 and 60 and for Leave to Amend Under Rule 15 filed by the plaintiff, be and the same is hereby overruled.

ENTERED this 19th day of April, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DANIEL LAVERN SETSER, Plaintiff,	)	
v.	)	No. 76-C-114-C ✓
THE UNITED STATES OF AMERICA, Defendant.	)	

FILED
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

In accordance with the Order of the Court filed on April 18, 1979, Judgment is hereby entered in favor of the Plaintiff, Daniel Lavern Setser, against the Defendant, The United States of America, in the sum of $32,000.00.

Dated this 18th day of April, 1979.

H. Dale Cook
Chief Judge

33

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MITCHELL K. STARK,

Plaintiff,

vs.

DR. RONALD J. BARNES, and
TULSA COUNTY JAIL,

Defendants.

78-C-430-C

ORDER

Heretofore and on April 2nd, 1979, the Court converted the Motion to Dismiss for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure filed by Dr. Ronald J. Barnes (Dr. William Ronald Barnes) to a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The parties were given due notice of such conversion and an opportunity to supplement the record.

The Motion for Summary Judgment is now ready for dispositive ruling by this Court.

Mitchell K. Stark appears in this civil rights action pro se. He alleges violation of Title 42 U.S.C. §1983, his Eighth Amendment Rights, alleging in his complaint cruel and unusual treatment; obvious neglect and deliberate indifference; and intentional mistreatment. His complaint can be summarized as follows:

He was in custody in the Pima County Jail in Tucson, Arizona, and while so incarcerated from March 11, 1978, to July 14, 1978, he was given a drug called "Endep" (an anti-depression drug). He further alleges that on July 14, 1978, he was transferred to the Tulsa County Jail, Tulsa, Oklahoma. He asserts that he brought the medicine prescribed in Tucson with him, and states that while the defendant allowed him "to finish taking it", the defendant refused to refill the prescription for the medication. He further alleges that the

Doctor (defendant herein) refused to contact the physicians in Tucson to get his medical file, although he offered to pay for the long-distance call. He further alleges that he asked to see the Doctor "2 and 3 times a week" and "he still refused to get my medication or have me examined". Plaintiff concludes:

> Therefore I believe my rights are being violated and have suffered mental anguish due to indifference and negligence and intentional mistreatment on behalf of Doctor Ronald J. Barnes which constitutes cruel and unusual punishment, which is a direct violation of the Eighth Amendment.

The relief sought by the plaintiff is that (i) medication be made available; (ii) relief in the amount of $150,000.00 mental anguish; and (iii) relief in the amount of $100,000 punitive damages.

In support of defendant's Motion, the Affidavits of William Ronald Barnes (Dr. Ronald J. Barnes), defendant herein; Raymond Hannon, Deputy Sheriff of Tulsa County (paramedic or paraprofessional for the Tulsa County Jail); and John Pilant, Deputy Sheriff of Tulsa County (paramedic or paraprofessional for the Tulsa County Jail) were submitted, along with medical records on plaintiff. Plaintiff has submitted copies of his medical records that he obtained from Pima County, Arizona.

The Affidavit of Dr. Barnes reflects that he personally saw the plaintiff some four times during his incarceration in the Tulsa County Jail, from the time of his reciept to his ultimate transfer to the Department of Corrections, and that Dr. Barnes consulted with the attending paramedics numerous times during that period regarding plaintiff's case. The plaintiff had received medication at the jail in Arizona via a "one-time" precription apparently issued by the previous jail physicians for the controlled drugs ENDEP (Amitriptyline HCl, a psychotropic antidepressant) and INDOCIN (Indomethacin M.S.D., for treatment of rheumatoid arthritis). Both bottles were plainly marked "NO REFILLS', which Dr. Barnes states means in the custom, practices and usage of the medical profession, that the patient does not manifest a serious long-range need for medication.

Dr. Barnes states that the prescribed dosage of one 75 mg at bedtime for the ENDEP prescription was approximately triple the normally recommended dosage (usually administered in 25 mg does three times per day) and he had some concern in conjunction with the "NO REFILLS" notation that plaintiff was possibly abusing the drug; that the controlled drug ENDEP is a psychotropic drug, considered to be habituating and subject to abuse by the user and that plaintiff evidenced some signs of abuse.

It appears from the affidavits of Dr. Barnes, John Pilant and Raymond Hannon, that during the period of time that plaintiff was incarcerated he complained basically of a need for the controlled drug Indocin, which is an arthritic medicine, for his neck and shoulder complaints. The Indocin was refilled by Dr. Barnes one time, and the prescription ran out approximately August 24th. Dr. Barnes had authorized the administration of the ENDEP prescription that plaintiff brought with him but at a lesser dosage than prescribed. It further appears that during the plaintiff's period of incarceration at the Tulsa County Jail, he did not request the drug ENDEP. Tests were administered to plaintiff on August 28, 1978, which confirmed Dr. Barnes' opinion that there was nothing physically worng with plaintiff regarding either his arthritis claim (for INDOCIN) or the ENDEP prescription. Dr. Barnes states that after the August 28, 1978 date, plaintiff did not again mention his arthritis complaint to Dr. Barnes or to the paramedics, but that he did make other non-related sick call complaints (9/6/78; 9/17/78; 10/30/78; 11/1/78; and 11/6/78) for cold, sore throat, pain, fever, flu and chills, headache and congestion, for which the Dr. authorized to administer SUDA FED (sinus medication) TYLENOL, AMPICILLIN (penicillin), Robitussin (expectorant), 4-Way Nasal Spray, Erythrocin (antibiotic) and Ornade (anthistimine).

The copies of medical records submitted by the plaintiff indicate a start date of 5/19/78 and stop date of 6/2/78 for the Indocin 25 mg TID; reflects that plaintiff complained of severe depression and spine pain. The report dated 3/23/78 recites:

> Restart Indocin 35 mg....indefinitely
> Start Endep 75 mg---7 days; Review 7-10 days.

The records further reveal that plaintiff "took a lot of speed on outside"; had a sleeping problem; was nervous; that he was placed in Hepatitis Isolation on April 5, 1978, and was released from isolation on April 25, 1978.

In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), on remand 554 F.2d 653 (5th Cir. 1977), Rehearing and Rehearing En Banc Denied Sept. 6, 1977; rehearing denied, 429 U.S. 1966, 97 S.Ct. 798, 50 L.Ed.2d 785, rehearing denied 559 F.2d 1217, certiorari denied, 98 S.Ct. 530, the Court said at page 105:

> ....,[i]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment.

In Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978) , it was said:

> .... [I]t is true that a properly pleaded claim of interference by prison officials with prescribed medical treatment is cognizable under §1983. See Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970). However, in order to state a claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. West v. Keve, 571 F.2d 158 (3rd Cir. 1978). The facts produced at trial through the testimony of appellant, sppellee Tyler, and the prison doctor belie the existence of the requisite deliberation and gravity. (emphasis added). Dickson v. Colman, 569 F.2d 1310 (5th Cir. 1978). Nor has Twyman established deliberate defiance of a medical order, despite his allegations. See Martinez v. Mancusi, 443 F.2d 921 (2nd Cir. 1970), cert. denied 401 U.S. 983, 91 S.Ct. 1202, 28 L.Ed.2d 335 (1971). There is adequate evidence of sick calls, examinations, diagnoses and medication. Smart v. Villar, 547 F.2d 112 (10th Cir. 1976)....

In Sconiers v. Jarvis, 458 F.Supp. 37 (USDC Kans. 1978) Judge Wesley Brown said:

> ....[N]or does the inmate's disagreement with the nature and type of medical care provided present a constitutional claim. Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977); Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1969). Plaintiff has a right to medical care but not to a type personally desirable to him. Henderson v. Secretary of Corrections, 518 F.2d 694 (10th Cir. 1975); Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968)....

In Mingo v. Patterson, 455 F.Supp. 1358 (USDC Col. 1978) the Court said at page 1362:

> If plaintiff's claim is one involving improper medical treatment then the merits of his allegations must be evaluated in light of the standard set out in Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976....

In Jordan v. Robinson, 464 F.Supp. 223 (USDC WD Pa. 1979) the Court held that "[I]t is only where an inmate's complaint of improper or inadequate medical treatment depicts conduct so cruel or unusual as to approach a violation of the Eighth Amendment's prohibition of such punishment that a colorable constitutional claim is presented." "Plaintiff's characterization of the treatment as cruel and unusual' does not make it so." Jordan v. Robinson, supra., at 225.

In Paniagua v. Moseley, 451 F.2d 228, 230 (10th Cir. 1971) the Court said:

> ....[W]e regard Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968), a civil rights case...., as sheding considerable light on the present controversy. In that case a distinction was drawn between a claim by a prisoner of a total denial of medical care, as opposed to a claim of inadequate medical care or the claim that a difference of opinion existed between the wishes of the lay patient and the professional diagnosis of the doctor, and in Coppinger we held that a difference of opinion between the prison doctor and the prisoner does not give rise to a constitutional right or sustain a claim under 42 U.S.C. §1983.

See also Douglas v. El Reno Reformatory, 404 F.Supp. 1316 (USDC WD Okla. 1975).

In the instant case, there is no showing of an physical condition; there is no showing that the petitioner's requests for medical treatment were denied; there is no showing that he was not seen by either the doctor or the paramedics, who were in direct communication with the doctor on numerous occasions. There are no facts shown by the petitioner in this case, either by direct averment or necessary implication that petitioner was denied the necessary medical treatment while incarcerated in the Tulsa County Jail. It appears that the "crux" of petitioner's complaint is that he did not receive the medication he felt that he was entitled to receive---the only inference that can be drawn from this conteniton is that he disagreed with

the medical treatment prescribed by the doctor (defendant). There is no indication in the record of the deliberate indifference to the medical needs, or of unnecessary and wanton infliction of pain, as it necessary to create an issue of fact under the legal standard of Estelle v. Gamble, supra.

In his requested relief, plaintiff prays that the medication be made available to him. The file reveals that plaintiff is no longer in the Tulsa County Jail, and this fact removes the efficacy of this request.

The complaints of the petitioner in this case simply do not amount to a substantial allegation of the violation of any constitutional right.

The Court, therefore, finds that the Motion for Summary Judgment of the defendant, Dr. Ronald J. Barnes (Dr. William Ronald Barnes should be sustained and the cause of action and complaint should be dismissed for failure to state a claim.

IT IS, THEREFORE, ORDERED that the Motion for Summary Judgment of the defendant, Dr. Ronald J. Barnes (Dr. William Ronald Barnes) be and the same is hereby sustained and this complaint and cause of action are dismissed for failure to state a claim.

ENTERED this 18th day of April, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VIRGINIA ANN FOSTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JALEE EVANS, an Individual, and SMOTHERS & EVANS, INC., A Foreign Corporation,	)	
	)	
	)	
Defendants.	)	No. 79-C-4-B

DISMISSAL WITH PREJUDICE

Comes now the plaintiff and dismisses the above entitled cause with prejudice to her right of filing any further action, all issues of law and fact having been fully compromised and settled.

Virginia Ann Foster
VIRGINIA ANN FOSTER

Attorney for Plaintiff

Tim McCormick
ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THEN
NORTHERN DISTRICT OF OKLAHOMA

JAMES E. DRAKE, D.D.S. and RONALD A. VANTUYL, D.D.S. d/b/a DENTAL SERVICES, an Oklahoma partnership,

Plaintiffs,

-vs-

BOARD OF GOVERNORS OF THE REGISTERED DENTISTS OF THE STATE OF OKLAHOMA, et al.,

Defendants.

No. 78-C-410-C

O R D E R

Upon the joint application and stipulation of the Plaintiffs and Defendants to dismiss the complaint herein, and for good cause shown, the Court finds that:

1. The complaint filed herein by the Plaintiffs should be dismissed by stipulation pursuant to the provisions of Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure;

2. That said dismissal is without prejudice and does not operate as an adjudication upon the merits of the causes of action contained in said complaint and that each party is responsible for its own attorneys' fees and costs incurred.

IT IS THEREFORE ORDERED BY THE COURT that the above styled and captioned complaint should be and the same is dismissed without prejudice.

/s/ H. Dale Cook

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARVIN C. CATRON Plaintiff, vs. McDONALD'S SYSTEM, INC., BAMA PIE, INC., DOLCO PACKAGING CORP., and PAUL W. MARSHALL, Defendants.	)	CIVIL ACTION NO. 76-C-201-C

FILED

APR 16 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

Now on this 16th day of April, 1979, the above styled and numbered cause of action comes on for settlement and dismissal pursuant to Rule 41 of the Federal Rules of Civil Procedure. The parties were represented by their respective counsel.

The Court has reviewed the Settlement Agreement and Joint Application for Dismissal with Prejudice, and finds: That the parties, and each of them, have agreed to dismiss, with prejudice, their respective claims pertaining to Patent 3,926,363 entitled "Stacking Trays and Containers for Perishable Items", issued to Marvin C. Catron on December 16, 1975, and pertaining to patent No. 4,009,817 entitled "Tray for Shipment of Frozen Items" issued to Paul W. Marshall, et al dated March 1st, 1977, and any and all claims, actions or causes of action that have arisen or may arise as a result of such patents or claims made in connection therewith; That each of the parties have agreed to bear their own costs and expenses, including attorneys fees;

That each of the parties is desirous of dismissing their respective claims with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the settlement agreement of the parties be and the same is hereby approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Order of the Court dated November 21, 1978, granting defendants' Motion to bring in Hoerner Waldorf Corporation as an additional defendant is hereby rescinded and the Motion is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's complaint against the defendants, and each of them, and the cross claim of the defendants against the plaintiff, be and the same are hereby dismissed, WITH PREJUDICE to future filing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties bear their own costs and expenses, including attorneys fees.

DATED this 16th day of April, 1979.

/s/ H. Dale Cook
H. DALE COOK, U.S. District Judge

APPROVED AS TO FORM:

Marvin C. Catron
MARVIN C. CATRON

GREEN, FELDMAN, HALL & WOODARD

By John R. Woodard, III
John R. Woodard, III
Attorneys for Plaintiff

McDONALD'S SYSTEM, INC.

By _____

DOLCO PACKAGING CORP.

By _____

BAMA PIE, INC.

By Paul W. Marshall
Paul W. Marshall
PAUL W. MARSHALL

_____
WILLIAM S. DORMAN
Attorneys for Defendants

_____
E. JOHN EAGLETON
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WANDA SUE KNIGHT,

Plaintiff,

vs.

TERMPLAN, INC.,

Defendant.

No. 78-C-77-B

FILED

APR 13 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Upon Motion of the plaintiff this action is dismissed with prejudice to a future action.

JUDGE OF THE UNITED STATES
DISTRICT COURT

APPROVED BY ALL PARTIES:

Maynard I. Ungerman
Attorney for Plaintiff
1710 Fourth National Bank Building
Tulsa, Oklahoma 74119

Bryce A. Baggett
Attorney for Defendant
600 Fidelity Plaza
Oklahoma City, Oklahoma 73101

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DUFF-NORTON CO., INC., a corporation, Plaintiff,	)	
vs.	)	No. 78-C-355-C
ROLLINGS MANUFACTURING, INC., a corporation doing business under the tradestyle of Mid AMERICA CRANE & HOIST CO., Defendant.	)	

FILED

APR 12 1979

JOURNAL ENTRY OF JUDGMENT

NOW on this 12th day of April, 1979, the above entitled matter came on regularly for hearing. Plaintiff appeared by its attorneys, Ungerman, Conner, Little, Ungerman & Goodman; Defendant appeared by its attorneys, Gable, Gotwals, Rubin, Fox, Johnson & Baker. Thereupon, the Court found that it had jurisdiction in the premises and that the Defendant had been duly served with summons and that the Court has jurisdiction over the parties and the subject matter of the cause.

THEREUPON, the Court being fully advised in the premises found that the Defendant is indebted to the Plaintiff in the principal sum of $32,292.69 with interest thereon at the rate of 10% per annum from date of judgment until paid, together with an attorney fee in the sum of $3,500.00 and all costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff have and is hereby granted a judgment against the Defendant in the principal sum of $32,292.69 with interest thereon at the rate of 10% per annum from date of judgment until paid together with an attorneys fee in the sum of $3,500.00 and all costs of the action.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

LAW OFFICES
UNGERMAN, CONNER, LITTLE, UNGERMAN & GOODMAN
1710 FOURTH NATL. BANK BUILDING
TULSA, OKLAHOMA

APPROVED AS TO FORM:

UNGERMAN, CONNER LITTLE, UNGERMAN & GOODMAN

By _____

Attorneys for Plaintiff

GABLE, GOTWALS, RUBIN, FOX, JOHNSON & BAKER

By _____

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA
TULSA DIVISION

DILLARD CRAVENS, et al.,
Plaintiffs,
vs.
AMERICAN AIRLINES, et al.,
Defendants.

CIVIL ACTION NO. 74-C-301

ORDER

The motion of defendant, American Airlines, Inc. ("American"), for summary judgment against certain applicant plaintiffs in intervention dated July 7, 1978 came on regularly for hearing before the Honorable H. Dale Cook, United States District Judge, on the 29th day of March, 1979. Plaintiffs and plaintiffs in intervention appeared by their attorney, Darrell L. Bolton. Defendant, American Airlines, Inc., appeared by its attorney, George Christensen, and defendants, Transport Workers Union of America, AFL-CIO, and Air Transport Local 514, appeared by their attorney, Maynard I. Ungerman.

The Court having read and considered the brief submitted by American in support of its motion for summary judgment, the Court having read and considered the depositions of plaintiffs in intervention and the affidavit of Donald L. Pearl, and no opposition brief or affidavits having been filed by plaintiffs in intervention, and the Court finding that there is no genuine issue of fact for trial and that defendant American is entitled to judgment as a matter of law, and good cause appearing therefor, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant American's motion for summary judgment is granted in all respects.

2. All claims of plaintiffs in intervention, James Willard Clark, Shirley Ann Davis, David Leon Deville, Linda Susan Harding, Thelma Elizabeth Harris, Virte Lee Rucker, Toni Lamar Shaver, Carroll South, Olene Yuvonne Washington, and Patricia Louise Winston, and each of them, shall be and are hereby dismissed with prejudice as to defendant American on the ground that each of said plaintiffs in intervention has failed to state a claim under either Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., or the Civil Rights Act of 1866, 42 U.S.C. § 1981.

3. All claims of Juanita Higgs, Thomas Monroe Higgs, and Cornell G. Miller, and each of them, shall be and are hereby dismissed with prejudice as to defendant American on the ground that said claims arose more than two years prior to the commencement of this suit and thus are time-barred by 12 Oklahoma Statutes, 1971, Section 95.

4. All claims of plaintiff in intervention, Johnny Lee Wright, shall be and are hereby dismissed with prejudice as to defendant American. The alleged 1977 claim fails to state a claim under either Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., or the Civil Rights Act of 1866, 42 U.S.C. § 1981. The alleged 1969 claim arose more than two years prior to the commencement of this suit and thus is time-barred by 12 Oklahoma Statutes, 1971, Section 95.

5. The question of attorney's fees and costs of suit are reserved until final judgment is entered in this case.

DATED: _____, 1979.

_____
United States District Judge

APPROVED AS TO FORM:

Darrell L. Bolton
Attorney for Plaintiffs in Intervention

Maynard I. Ungerman
Attorney for Defendants,
Transport Workers Union of America, AFL-CIO,
and Air Transport Local 514

George Christensen
Attorney for Defendant,
American Airlines, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THE NORTHWESTERN BANK, GEORGE A. MORETZ and HELEN S. MORETZ, as Executors of the Estate of O. LEONARD MORETZ, Deceased,	)	
Plaintiffs,	)	
v.	)	No. 79-C-142-C
CUSTOM BRICK COMPANY, OKLAHOMA STEEL CASTINGS COMPANY, an Oklahoma Corporation, UNION NATIONAL BANK OF CHANDLER, an Oklahoma Corporation,	)	
Defendants.	)	

FILED

APR 12 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER SUBSTITUTING PARTY DEFENDANT
UPON STIPULATION AND GRANTING LEAVE TO
FILE ANSWER OUT OF TIME

Upon the motion of defendant, Union National Bank of Chandler, and Savings Life Insurance Company, and upon the stipulation of counsel for plaintiffs, the Court does hereby order that Savings Life Insurance Company be substituted for Union National Bank of Chandler as a defendant in the above-referenced matter, and that plaintiffs' claims against Union National Bank of Chandler be dismissed without prejudice. Furthermore, the Court grants leave to Savings Life Insurance Company to file on this date its Answer to plaintiffs' Complaint.

Dated this 12th day of April, 1979.

The Honorable H. Dale Cook
United States District Judge

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EMILIO DAVID REYES and JEAM M. WILLKOM REYES, M.D., Plaintiffs, vs. ELMER L. ANDERSON d/b/a ANDERSON LUMBER CO., ANDERSON CONSTRUCTION CO. and ANDERSON TRUSS CO., Defendant.	CIVIL ACTION NO. 78-C-513-C

NOTICE OF DISMISSAL WITH PREJUDICE

COME NOW plaintiffs, Emilio David Reyes and Jean M. Willkom Reyes, M.D., and pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure (28 U.S.C.A.) and in accordance with paragraph No. (7) of that certain Compromise Settlement Agreement between plaintiffs and defendant dated January 9, 1979 (a copy of which is attached hereto, made a part hereof and designated "Exhibit A"), hereby do dismiss the claims which they asserted against defendant in their Complaint filed herein on October 16, 1978 with prejudice; provided, however, that this Dismissal With Prejudice shall not operate or be construed as a release by plaintiffs of any claims which they may have against defendant other than those claims which were known to plaintiffs when they filed said Complaint and which were expressly asserted by plaintiffs in said Complaint on October 16, 1978.

THORNTON, WAGNER & THORNTON,
a Professional Corporation

By _____
David M. (Mike) Thornton, Jr.
525 South Main, Suite 660
Tulsa, Oklahoma 74103
(918) 587-2544

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I, David M. (Mike) Thornton, Jr., hereby certify that I mailed a true and correct copy of the above and foregoing instrument to Gary L. Butler, Esquire, 123 East Central, P. O. Box 4, Miami, Oklahoma 74354, by depositing same in the U. S. mail with proper postage prepaid thereon on this 11 day of April, 1979.

David M. (Mike) Thornton, Jr.

COMPROMISE SETTLEMENT AGREEMENT

NOW on this 9th day of January, 1979, EMILIO DAVID REYES and JEAN M. WILKOM REYES, M.D. (herein jointly called "Reyes") and ELMER L. ANDERSON d/b/a ANDERSON LUMBER COMPANY, ANDERSON CONSTRUCTION COMPANY and ANDERSON TRUSS COMPANY (herein collectively called "Anderson"), the parties hereto, hereby do enter into this Compromise Settlement Agreement upon the following terms:

WHEREAS, Reyes as owner and Anderson as contractor entered into a certain written Construction Agreement on or about January 19, 1978, by which Anderson agreed to construct a residence for Reyes for the sum of $140,000.00 (less certain allowances), and subsequently certain disputes arose between the parties regarding their respective obligations under said Construction Agreement which resulted in Reyes commencing suit against Anderson in the United States District Court for the Northern District of Oklahoma on October 16, 1978, said suit being styled Reyes v. Anderson, No. 78-C-513-B.

WHEREAS, Anderson refused to complete construction of said residence on the ground that he was entitled to additional payments from Reyes for certain alleged extra work under said Construction Agreement; and,

WHEREAS, Reyes refused the additional payments claimed by Anderson on the ground that the payments were not due Anderson under said Construction Agreement and completed construction of said residence with other contractors while seeking relief from Anderson as set forth in their Complaint in said suit; and,

WHEREAS, Anderson has failed to pay subcontractors and materialmen for labor and/or materials which they performed or provided for said residence under contracts with Anderson and as a result thereof some of these subcontractors and materialmen have filed liens against said residence and others may yet have unexpired lien rights against said residence; and,

"EXHIBIT A"

WHEREAS, Anderson now desires to be released, acquitted and discharged of and from the claims which Reyes have asserted against him in said suit and agrees that in exchange for a Dismissal With Prejudice of said claims by Reyes, Anderson will accept responsibility for and pay all said subcontractors and materialmen and satisfy, otherwise discharge or extinguish all their liens or lien rights as agreed herein.

NOW, THEREFORE, for valuable consideration, the sufficiency thereof hereby being acknowledged by the parties, it hereby is agreed:

(1) That by no later than the 20th day of January, 1979, Anderson shall pay in full or arrange to pay in full all debts due to all subcontractors and materialmen for any labor or materials which said subcontractors and materialmen performed or provided for Anderson's construction of said residence under said Construction Agreement between the dates of January 19, 1978, and September 20, 1978, inclusive; and, that by said date Anderson shall satisfy or otherwise discharge any and all liens which have been or which may be filed against said residence by any of said subcontractors or materialmen to secure payment for any of said labor and materials, and shall extinguish any lien rights which any of said subcontractors and materialmen yet may have at said date.

(2) That Anderson shall hold and save Reyes harmless from and indemnify Reyes against any claims, demands, causes of action, suits (as well as all attorneys' fees and other legal expenses and any liability or damages arising therefrom) which may be asserted against Reyes by any of said subcontractors or materialmen by reason of Anderson's failure to make full payment for said labor and materials and/or to satisfy or otherwise discharge said liens or extinguish said lien rights.

(3) That under paragraphs (1) and (2) above, Anderson shall have no responsibility with respect to any subcontractors or materialmen which were employed and which were to be paid directly by Reyes; that "Exhibit A" attached hereto and made a part hereof

is a list of the claims of those subcontractors and materialmen of Anderson which must be paid by Anderson under paragraph (1) and (2) above as far as the same are now known by the parties; that said "Exhibit A" is not intended to be and shall not be construed to be a complete list of said claims and shall not in any way limit Anderson's obligations under paragraphs (1) and (2) above.

(4) That upon execution of this agreement Anderson shall tender to Reyes a cashier's or certified check in payment of the amount of $500.00 as partial consideration for Reyes' execution of this Compromise Settlement Agreement.

(5) That by execution of this agreement Anderson hereby does completely and finally release, acquit and discharge Reyes of and from any and all obligations and liabilities which they may have incurred in connection with said Construction Agreement and without limitation of the foregoing hereby does acknowledge that he has received payment of all monies due to him under said Construction Agreement.

(6) That Anderson hereby acknowledges full responsibility for the payment of his subcontractors and materialmen as required under paragraphs (1) and (2) above as having been his contractual obligation under said Construction Agreement; that Anderson acknowledges that he has made or caused to be made certain oral and written statements to third parties, including his subcontractors and materialmen, denying said contractual obligaton or alleging that he was unable to perform said contractual obligation by reason of Reyes' failure to perform their contractual obligations under said Construction Agreement; that Anderson hereby states that such statements by him were false and apologizes to Reyes for such false statements; that upon execution of this Compromise Settlement Agreement Anderson shall execute and deliver to Reyes a formal letter of apology for said false statements; that Reyes hereby completely and finally release, acquit and discharge Anderson of and from any and all liability for said statements.

(7) That upon performance by Anderson of his obligations

hereunder Reyes shall cause said suit and all their claims against Anderson therein to be dismissed with prejudice and this agreement shall thereupon become a complete and final release of said claims. Both parties stipulate and agree that such dismissal should occur by no later than January 20, 1979.

(8) This agreement shall be binding upon the heirs, executors, administrators, and assigns of the parties hereto.

The parties hereby witness this agreement and their due execution of it this 9th day of January, 1979.

Witness

Emilio David Reyes
Emilio David Reyes

Witness

Jean M Willkom Reyes MD
Jean M. Willkom Reyes, M.D.

Witness

Elmer L. Anderson
Elmer L. Anderson, d/b/a
Anderson Lumber Company,
Anderson Construction Company,
and Anderson Truss Company

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

The foregoing instrument was acknowledged before me this ___ day of _____, 197__, by Emilio David Reyes and Jean M. Willkom Reyes, M.D., husband and wife.

Notary Public

My Commission Expires:
_____

STATE OF OKLAHOMA)
) SS.
COUNTY OF OTTAWA)

The foregoing instrument was acknowledged before me this 11th day of January, 1979, by Elmer L. Anderson.

Notary Public

My Commission Expires:
August 11, 1982

Miami Tin	$9,680.00
Miami Stone	$6,332.28
Booth Electric	$1,725.23
Studebaker Cabinet Shop	$6,077.00
Sherwin Williams	$ 338.27
Youngs Distributing (Tile)	$1,247.37
Overhead Door of Locust Grove	$ 526.24
Seward Insulation	$ 539.04
Bud Wyatt (Install intercom)	$ 114.17
Orval Wyrick (Labor on tile)	$ 400.00
Joe Dumas (Labor on formica, etc.)	$ 200.00

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DARYL F. VICKERY, Plaintiff,	)	
vs.	)	NO. 78-C-288-C
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Defendant.	)	

ORDER OF DISMISSAL

Now on this 11th day of April, 1979, there comes on for hearing the Stipulation for Dismissal of the plaintiff, Daryl F. Vickery, and the defendant, The Atchison, Topeka and Santa Fe Railway Company, in the above entitled cause. The Court finds that said cause has been satisfactorily settled by and between the parties hereto, and that the consideration therefor has been accepted by plaintiff, in full settlement, satisfaction, release and discharge of his cause of action and claim against the defendant, The Atchison, Topeka and Santa Fe Railway Company, and the Court, after due consideration, finds that said Dismissal should be approved.

IT IS THEREFORE ORDERED that the cause of action of the plaintiff be and the same is hereby dismissed with prejudice.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Clifford Hatcher
Attorney for Plaintiff

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

JOHN MURPHY,)
)
Plaintiff,)
)
v.) NO. 78-C-28-B
)
TESORO PETROLEUM CORPORATION,)
a Delaware corporation,)
)
Defendant.)

FILED

APR 11 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the Joint Stipulation for Dismissal, agreed to by all parties and being fully advised in the premises, finds:

IT IS ORDERED that the Joint Stipulation for Dismissal is hereby approved pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure and the causes of action complained of are dismissed with prejudice as against the Defendant, Tesoro Petroleum Corporation, with each party to bear its own court costs and attorney's fees.

Dated this 11th day of April, 1979.

/s/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA AND THOMAS W. HENRY, SPECIAL AGENT, Petitioners,	)	
vs.	)	No. 77-C-12-B
FRANCO LIMITED and RALPH DEWAYNE FRANKS, as President of FRANCO LIMITED, Respondents.	)	
UNITED STATES OF AMERICA and THOMAS W. HENRY, SPECIAL AGENT, Petitioners,	)	
vs.	)	No. 77-CR-13-B
FRANCO LIMITED and KATHERENA FRANKS, as Vice-President of FRANCO LIMITED, Respondents.	)	

ORDER DISCHARGING RESPONDENTS
AND DISMISSAL

On this 11th day of April, 1979, Petitioners' Motion To Discharge Respondents And For Dismissal came for hearing and the Court finds that Respondents have now complied with the Internal Revenue Service Summonses served upon them September 20, 1976, that further proceedings herein are unnecessary and that the Respondents, Franco Limited and Ralph Dewayne Franks, as President of Franco Limited and Franco Limited and Katherena Franks, as Vice-President of Franco Limited, should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Respondents, Franco Limited and Ralph Dewayne Franks, as President of Franco Limited and Franco Limited and Katherena Franks, as Vice-President of Franco Limited, be and they are hereby discharged from any further proceedings herein and this cause of action and complaints are hereby dismissed.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA for the use and benefit of L. B. SMITH, INC., SOUTHWEST, a corporation, Plaintiff, vs. UTILITY CONTRACTORS, INC., a corporation; MID-STATES CONSTRUCTION OF DERBY, INC., a corporation; and FEDERAL INSURANCE COMPANY, a corporation, Defendants.	)	No. 78-C-565-C

DEFAULT JUDGMENT

This action came on for determination before the Court, Honorable H. Dale Cook, District Judge, presiding, and the Court being duly informed in the matter and after being informed that the Clerk has entered a Rule 55 Judgment in favor of plaintiff L. B. Smith, Inc., Southwest, and against defendant Mid-States Construction of Derby, Inc., a corporation,

IT IS ORDERED AND ADJUDGED:

That the plaintiff L. B. Smith, Inc. Southwest, a corporation, recover of the defendant Mid-States Construction of Derby, Inc., a corporation, the sum of $11,902.85, with interest thereon at the rate of 10% per annum as provided by law and its costs of action.

Dated at Tulsa, Oklahoma this 10th day of April, 1979.

s/ H. Dale Cook
H. Dale Cook, District Judge

APPROVED:

s/ Charles E. Malson

Charles E. Malson
914 First Life Assurance Building
119 North Robinson
Oklahoma City, Oklahoma 73102
(405) 236-0020

Attorney for L. B. Smith, Inc., Southwest

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY C. WAKEFIELD and ELIZABETH R. WAKEFIELD, husband and wife,

Defendants.

CIVIL ACTION NO. 79-C-22-B

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 10th day of April, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney, the Defendants, Anthony C. Wakefield and Elizabeth R. Wakefield, appearing not.

The Court being fully advised and having examined the file herein finds that Anthony C. Wakefield and Elizabeth R. Wakefield were served by publication as shown on the Proof of Publication filed herein.

It appearing that the said Defendants, Anthony C. Wakefield and Elizabeth R. Wakefield, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note and that the following described real property is located in Ottawa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> The North 65 feet of Lots 7 and 8 in Block 9 in the GOODVIEW ADDITION to the City of Miami, Ottawa County, Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Anthony C. Wakefield and Elizabeth R. Wakefield, did on September 30, 1977, execute and deliver to the United States of America, acting through the Farmers Home Administration, their mortgage and mortgage note in the sum of $17,000.00, with 8 percent interest per annum, and further

providing for the payment of monthly installments of principal and interest.

The Court further finds that the Defendants, Anthony C. Wakefield and Elizabeth R. Wakefield, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $18,443.51 as unpaid principal, with interest thereon at the rate of 8 percent per annum from October 13, 1978, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Anthony C. Wakefield and Elizabeth R. Wakefield, in rem, for the sum of $18,443.51 with interest thereon at the rate of 8 percent per annum from October 13, 1978, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff by taxes, insurance, abstracting or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any

right, title, interest or claim in or to the real property or any right thereo.

UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 79-C-44-B
THOMAS N. JONES, Defendant.	)	

FILED

APR 10 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 10th day of April, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Thomas N. Jones, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Thomas N. Jones, was personally served with Summons and Complaint on January 26, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Thomas N. Jones, for the sum of $798.10, plus the costs of this action accrued and accruing.

UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE
Assistant United States Attorney

cl

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 79-C-45-C
BYRON O. BRIGHTWELL, Defendant.	)	

FILED

APR 10 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 10th day of April, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Byron O. Brightwell, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Byron O. Brightwell, was personally served with Summons and Complaint on January 26, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Byron O. Brightwell, for the sum of $981.38, plus the costs of this action accrued and accruing.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE
Assistant United States Attorney

cl

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 78-C-605-C
DAVID L. BLAIR, Defendant.	)	

FILED

APR 10 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 10th day of April, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, David L. Blair, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, David L. Blair, was personally served with Summons and Complaint on January 25, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, David L. Blair, for the sum of $995.49, plus the costs of this action accrued and accruing.

UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE
Assistant United States Attorney

cl

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 78-C-330-B
	)	
THELMA LOUISE WILLIAMS, a single person; COUNTY TREASURER, Tulsa County, Oklahoma; and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	

STIPULATION OF DISMISSAL

COME NOW the United States of America, by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Board of County Commissioners, Tulsa County, Oklahoma and the Tulsa County Treasurer, Tulsa County, Oklahoma, by and through their attorney, John R. Reif, Assistant District Attorney, and stipulate that this action be dismissed upon the ground and for the reason that the United States has received payment in full of its mortgage claim herein.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

By: _____
ROBERT P. SANTEE
Assistant U. S. Attorney

By: _____
JOHN F. REIF, Assistant District Attorney for Board of County Commissioners, Tulsa County and Tulsa County Treasurer, Tulsa County

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FRANCES R. CARTER, Individually and as Mother and Next Friend of Jeffrey Giles Carter and Bradley Thomas Carter, Minors; and Michael Keith Carter and Kerry Carter, Plaintiff,	)	
-VS-	)	No. 76-C-433(B)
IDA M. HORETH, Administratrix of the Estate of John M. Horeth, deceased; and WENDELL W. CLARK, Administrator of the Estate of Ricardo Enrique Sanchez-Vegas, deceased. Defendant,	)	
and JAMES S. MAXWELL, Administrator of the Estate of Keith D. Carter, deceased. Third Party Defendant.	)	

ORDER DISMISSING THIRD PARTY

COMPLAINT WITH PREJUDICE

There came regularly on for hearing the defendants Ida M. Horeth stipulation for dismissal with prejudice of her complaint against the Third Party Defendant, James S. Maxwell. The court being fully advised in the premises determined that the stipulation should be excepted.

IT IS THEREFORE ORDERED that the Third Party Complaint of Ida M. Horeth, Administratrix of the Estate of John M. Horeth, deceased, against James S. Maxwell, Administrator of the Estate of Keith D. Carter, deceased, should be and is dismissed with prejudice, each party to bear their own cost.

Dated on this the 10th day of April, 1979.

H. Dale Cook
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CENERGY, INC., a Texas corporation,	)	
Plaintiff,	)	79-C-11-C
vs.	)	
SAMUEL JORGENSON and EDITH JORGENSON,	)	
Defendants.	)	

ORDER

On November 6, 1978, Samuel Jorgenson and Edith Jorgenson (defendants herein) instituted an action against Cenergy, Inc. (plaintiff herein) and Russell Creek Coal Company, in the District Court of Craig County, Oklahoma, being cause number C-78-160. The petition in the State Court action contains four causes of action, summarized briefly as follows:

The first cause of action is against Russell Creek County Coal Company and seeks equitable forfeiture of certain coal and water leases entered into between Cenergy, Inc. and the Jorgensons, along with incidental damages. The Joregensons allege that the defendant failed to comply with the duty implied by law to develop and mine the leased premises with reasonable diligence.

The second and third causes of action by the Jorgensons are asserted against Russell Creek Coal Company (not Cenergy, Inc.) because of the belief of the Jorgensons that all rights, obligations, and responsibilities of Cenergy, Inc. have been assigned by Cenergy, Inc. to its subsidiary operating company, Russell Creek County Coal Company. The basis of this belief is premised on Exhibits "D" and "E" attached to the State Court petition, reflecting (Exhibit "D") a Prepaid Royalty Agreement between the Jorgensons and Russell Creek Coal Company, dated December 15, 1977; and A royalty Payment Deviation from Original Lease Agreement (Exhibit "E"), between Russell Creek Coal Company

and the Jorgensons, dated February 17, 1978. The second cause of action against Russell Creek County Coal Company seeks forfeiture and incidental damages against Russell Creek County Coal Company for an alleged breach of its obligation to dig and recover the greatest possible amount of coal and not to comit waste upon the property leased. The third cause of action against Russell Creek County Coal Company seeks a judicial declaration that the leasehold has been abandoned by the lessee.

The Fourth cause of action in the State Court proceeding is asserted against Cenergy, Inc. and Russell Creek County Coal Company, alleging a fraud and default.

On January 4, 1979, Cenergy, Inc., commenced this action in this Court against the Jorgensons, alleging that the Jorgensons wrongfully evicted them from the leasehold, seeking damages in the sum of $944,233.00 plus $59,915 for each additional month which "elapses until Plaintiff can obtain an alternate source of coal".

On January 30, 1979, the defendants in this case filed a Motion, designated as follows: "Motion to Dismiss, Presenting Defenses of Failure to State a Claim, of Lack of Jurisdiction Under Rule 12(b) and of Failure to Join an Indispensable Party; or, in the Alternative, Motion for a More Definite Statement of Facts, and Motion to Strike."

The Motion has been briefed by the parties and is ready for dispositive ruling by the Court.

On page 9 of their original brief, the defendants state:

> We are not in the instant matter dealing with facts that deny the Northern District of jurisdiction. We are not concerned with the Doctrine of Abstention ...., nor are we dealing with a case where (i) the relief sought in the federal court is that of declaratory judgment....; (ii) or where the relief sought in the federal court is equitable in nature....
>
> What is now before the United States District Court for the Northern District of Oklahoma is a determination, to be made within, the reasoned discretion of that court, as to whether the ends of justice may be better met in the state court or the federal court.

On page 1 of the original brief of the defendants, they concede that this Court has "subject matter jurisdiction".

On page 1 of their responsive brief, defendants state that

the Motion to Dismiss was filed by the defendants and was so "entitled" because "the language of Rule 12 of the Federal Rules of Civil Procedure does not itself appear to provide for the filing of a 'Motion to Stay.'"

"In a number of tightly drawn situations, federal courts may stay or dismiss federal actions in order to foster the interests of judicial administration: comprehensive disposition of litigation; conservation of judicial resources; and fairness to the parties. When two cases presenting the same issues are pending in different district courts within the federal system, it has long been held that the federal courts have the power to stay one of the cases in order to promote the efficient use of judicial resources. When the same issues are simultaneously before a federal and state court, the traditional approach has been more restrictive. Ordinarily federal courts are obliged to hear cases properly within their jurisdiction even though a state case has also been filed." Moore's Federal Practice, Vol. 1A (Part 2), ¶0.203[4].

In Wright & Miller, Federal Practice, Vol. 17, ¶4247, it is stated:

> In more recent years, however, as docket pressures increased, it became more common for federal courts to refuse to hear a case if there was a pending state action arising out of the same controversy. Finally in 1976 the Supreme Court spoke to the question. It recognized that a federal court may dismiss an action on this ground but only in "exceptiona" circumstances. [Colorado River Water Conservation Dist. v. U.S., 1976, 96 S.Ct. 1236, 1247, 424 U.S. 800, 818, 47 L.Ed.2d 483.

In discussing the Colorado River Water Conservation District cases, supra, it is stated in Moore's Federal Practice, Vol. 1A (Part 2), ¶0.203[4]:

> In 1976, the Supreme Court held for the first time in Colorado River Water Conservation District v. United States, that the district courts had authority to stay or dismiss an action in the federal court because of the pendency of a state proceeding. However, because the court in Colorad relied heavily on the McCaren amendment as expressive of a policy favoring resolution of federal water claims in state courts, Colorado provides little, if any, support for the heretofore lo-er court cases staying or dismissing federal actions due to the pendency of a state proceeding. Moreover, in the course of the opinion the court stated:
>
> > "Given this obligation [to exercise jurisdiction], and the absence of weightier considerations of constitutional

> adjudication [as in Pullman abstention cases] and federal state relations [as in Thobodaux and Younger v. Harris], the circumstances permitting dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention."

The precise meaning of the court's statement is uncertain. In the absence of a manifest congressional policy that a given case be litigated in state courts, it may well be that it would be an abuse of discretion for a district court to stay or dismiss a federal action because of the pendency of a similar state proceeding.

In Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) the Court said:

> It is well established that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal Court having jurisdiction." McClellan v. Carland, 217 U.S. 268, 282. It is equally well settled that a district court is "under no compulsion to exercise that jurisdiction," Brillhart v. Excess Ins. Co., 316 U.S. 491, 494 (1942), where the controversy may be settled more expeditiously in the state court....

At page 664, the Court said:

> It is true that Colorado River emphasized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U.S., at 817. That language underscores our conviction that a district court should exercise its discretion with this factor in mind, but it in no way undermines the conclusion of Brillhart that the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis a matter committed to the district court's discretion.... (Emphasis supplied)

In reviewing the State Court petition, vis a vis the Complaint filed in this action, it is apparent that both proceedings emcompass common questions of fact and law common one to the other. There can be no denial that the claims of all the parties arise and grow out of the lease agreements entered into between the parties. This is a federal diversity action raising only state law issues. The in-state plaintiff citizens (defendants herein) have previously commenced litigation in the State Court, involving the plaintiff in the instant action.

The Court is of the opinion that this action should be dismissed. There is nothing to preclude the plaintiff in this action from raising his claims asserted herein in the State Court action by pleading. Principles of comity, federalism, and sound, adequate and economical allocation of judisical resources and effort could not tolerate a different result. The Court comes to this result that a dismissal

rather than a stay is proper. Colorado River case, supra. Additionally, the distinction between a dismissal and a stay in this kind of case has always seemed extremely artificial. Wright & Miller, Federal Practice, Vol. 17, §4247. The Court is of the opinion that if it stayed the present action, the state court would proceed to resolve the controversy, and if the party returns to federal court after the state court action is over, the most that will be needed to dispose of the instant case are imposition of theories of res judicata or collateral estoppel. Thus a stay in this action, for all practical purposes, would be a dismissal. What plaintiff in the instant action is requesting is in effect piecemeal adjudication of questions all arising out of the lease agreements here involved.

Additionally, there is a strong question and doubt in the mind of the Court as to whether Russell Creek County Coal Company actually is an indispensable party. (See Exhibits "D" and "E" hereinabove referred to commencing at page 1 of this Order. Plaintiff argues that indispensable party is not proper under 12(b)(6) and the Court agrees that such motion should be made under 12(b)(7). In the Motion filed by the defendants, they do raise a defense of failure to state a claim, but additionally raise the defense, among other, of failure to join an indispensable party, all under 12(b) with no designation as to which subsection is applicable. The Court will thus conclude that the indispensable party is raised under 12(b)(7).

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendants be and the same is hereby sustained and this cause of action and complaint are dismissed without prejudice.

ENTERED this 6th day of April, 1979.

H. DALE COOK,
CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

WILLIAM T. CURLEY, III,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 77-C-444-C
	)	
THE STATE OF OKLAHOMA, ex rel., THE DEPARTMENT OF CORRECTIONS, et al.,	)	
	)	
Defendants.	)	

ORDER AWARDING PLAINTIFF ATTORNEY'S FEES

This matter comes on for hearing this 29th day of March, 1979, before the Honorable H. Dale Cook, United States District Judge for the Northern District of Oklahoma, pursuant to an order of the United States Court of Appeals for the Tenth Circuit directing this Court to determine a reasonable attorney's fees to be awarded plaintiff's counsel in this cause.

Plaintiff appears by and through his attorney of record, WESLEY E. JOHNSON; the defendants appear by and through the Attorney General of the State of Oklahoma, and JANET L. COX, Assistant Attorney General.

The Court FINDS that the parties have heretofore entered into a mutual agreement as to a reasonable attorney's fees to be awarded to plaintiff's attorney in this cause.

The Court further FINDS that the parties have stipulated and agreed that counsel for plaintiff has expended a total of 96.6 hours in the preparation and trial of this action, and that an hourly rate of Fifty Dollars ($50.00) per hour is a reasonable rate to charge for the services performed by plaintiff counsel.

The Court further FINDS that the parties have stipulated and agreed that plaintiff is entitled to an award of attorney's fees in the total amount of Four Thousand Eight Hundred Thirty Dollars ($4830.00).

The Court further FINDS that plaintiff has expended the following to be taxed as costs in this action: Two Dollars ($2.00) for xerox copies; Fifteen Dollars ($15.00) for filing fee, and

Thirty-Six and Sixteen Cents ($36.16) for U.S. Marshal service of process.

The Court further FINDS that the agreement of the parties is fair and equitable and that said agreement reflects the consideration of the novelty of the issue; the time and labor required; whether the fee was fixed or contingent; the experience, reputation and ability of the plaintiff's attorney; the customary fee of the community; and the preclusion of other employment by plaintiff's attorney due to acceptance of the case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the agreement entered into between the parties be and the same is hereby approved.

IT IS FURTHER ORDERED that counsel for the plaintiff, WESLEY E. JOHNSON, be awarded a reasonable attorney's fees against the defendants in the total sum of Four Thousand Eight Hundred and Thirty Dollars ($4830.00) together with the sum of Fifty-Three Dollars and Sixteen Cents ($53.16) as and for costs of this action.

DATED this 9th day of April, 1979.

H. DALE COOK, U.S. DISTRICT JUDGE

Approved as to form:

WESLEY E. JOHNSON
Attorney for Plaintiff

JANET L. COX
Assistant Attorney General
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RALPH HERBERT LINDLEY,

Plaintiff,

vs.

AMOCO PRODUCTION COMPANY, and FLOYD L. WALKER,

Defendants.

78-C-450-C

FILED

APR 9 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

Pursuant to the Order entered simultaenously with this Judgment this date,

IT IS ORDERED that Judgment be entered in favor of the defendants, Amoco Production Company and Floyd L. Walker, and against the plaintiff, Ralph Herbert Lindley.

ENTERED this 9th day of April, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES BERNELL BARR,

Plaintiff,

vs.

BOB SELLERS,

Defendant.

77-C-456-C

FILED

APR 9 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

Pursuant to the Order filed simultaneously this date,

IT IS ORDERED that Judgment be entered in favor of the plaintiff, Charles Bernell Barr, and against the defendant, Bob Sellers.

ENTERED this 9th day of April, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 6 1979

SHOPMEN'S LOCAL 620 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO, A Labor Organization, and STEVE WILLEY, LECHITA SANDERS and DANNY J. CARLISLE,	)	
Plaintiffs,	)	No. 79-C-138-C
-vs-	)	
RILEY SOUTHWEST CORPORATION,	)	
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

Comes now before me, the undersigned Judge of the United States District Court for the Northern District of Oklahoma, the plaintiffs by and through their attorneys, Smith, Brown, Martin, Adkisson & Birmingham by Thomas F. Birmingham and the defendant, Riley Southwest Corporation, by and through its attorneys , Kothe, Nichols & Wolfe, Inc. by Lynn Paul Mattson and both parties, through their attorneys in open Court, having waived their request for jury trial and authorized the Court to proceed based upon the arguments of counsel and stipulation as to the facts, the Court having fully examined the pleadings filed herein and having heard arguments of counsel and stipulation of facts, makes the following findings:

1. The Court has jurisdiction of the subject matter and the parties hereto.

2. That upon examination of the pleadings and hearing the stipulation of facts and argument of counsel, that the plaintiffs are entitled to an order to be issued herein compelling arbitration by the defendant in the matters of the grievances of Steve Willey, Lechita Sanders and Danny J. Carlisle.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the defendant, Riley Southwest Corporation, is ordered to participate in the arbitration of the grievances between itself and the plaintiffs, Steve Willey, Lechita Sanders and Danny J. Carlisle pursuant to the Collective Bargaining

Agreement currently existing between the plaintiff, Shopmen's Local 620 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, a labor organization, and the defendant, Riley Southwest Corporation.

DONE this 6th day of April, 1979.

H. Dale Cook
Judge of the United States District Court

Approved as to form:

SMITH, BROWN, MARTIN, ADKISSON & BIRMINGHAM
Attorneys for Plaintiff

BY: Thos F. Bir
Thomas F. Birmingham

KOTHE, NICHOLS & WOLFE, INC.
Attorneys for Defendant

BY: Lynn P. Mattson
Lynn Paul Mattson

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OPAL FLORENCE LIGGETT, ADMINISTRATRIX OF THE ESTATE OF EMMETT LEE LIGGETT, DECEASED,	)	
Plaintiff,	)	
v.	)	No. 78-C-351-C
BILLY DEAN COUSINS,	)	
Defendant.	)	

JUDGMENT

In accordance with the Order of the Court filed on ~~March~~ April 6TH, 1979, Judgment is hereby entered in favor of the Defendant, Billy Dean Cousins, and against the Plaintiff, Opal Florence Liggett, Administratrix of the Estate of Emmett Lee Liggett, Deceased, together with Defendant's costs.

Dated this 6th day of ~~March~~ April, 1979.

H. Dale Cook
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ESCOA FINTUBE CORPORATION, an Oklahoma Corporation, Plaintiff,	)	
vs.	)	No. 76-C-572-C
TRANTER, INC. a Michigan Corporation, Defendant.	)	

FILED

APR 6 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

The Court on April 6, 1979, filed its Findings of Fact and Conclusions of Law which are hereby incorporated herein and made a part of its Judgment.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Judgment be entered in favor of the defendant Tranter, Inc. in accordance with this Court's Findings of Fact and Conclusions of Law.

It is so Ordered this 6th day of April, 1979.

H. Dale Cook

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ESCOA FINTUBE CORPORATION, an Oklahoma Corporation, Plaintiff,	)	
vs.	)	No. 76-C-572-C
TRANTER, INC. a Michigan Corporation, Defendant.	)	

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This is an action for infringement of certain claims of two U. S. Letters Patent, claims 1 and 2 of Number 3,752,228, and claims 1, 2, 5, 6, and 7 of Number 3,764,774 (hereinafter referred to as '228 and '774, respectively). The defendant herein alleges that the patents in suit are invalid and therefore not infringed. The case was tried to the Court on February 6 - 10, 1978 and the trial was continued on February 28 and March 1, 1978. The parties have submitted trial briefs and proposed findings of fact and conclusions of law, and the case is now ready for disposition on the merits.

After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Patent '228, entitled "I-Type Segmented Finned Tube," was granted on August 14, 1973 to Robert Carl Boose. Patent '774, entitled "I-Type Segmented Finned Tube and Its Method of Manufacture," was granted on October 9, 1973 to Robert Carl Boose.

2. This is an action arising under the patent laws of the United States.

3. Plaintiff herein, Escoa Fintube Corporation (hereinafter referred to as Escoa), is an Oklahoma corporation having its principal place of business in Pryor, Oklahoma.

4. Defendant herein, Tranter, Inc., is a Michigan corporation having a regular and established place of business at 4150 South Elwood, Tulsa, Oklahoma, known as its Kentube Division (hereinafter referred to as Kentube). The Kentube plant is the situs of the alleged acts of infringement.

5. Escoa is now and has been the owner of both patents in suit since the issue dates thereof.

6. Both of the patents in suit relate to a species of finned tube.

7. Finned tubes have a variety of applications in the process of heat exchange. Finned tubes transfer the heat from hot gases circulated over the exterior of the tube to cooler fluids circulated in the interior of the tubes.

8. The finned tube basically consists of a solid metal tube with a metal fin attached to the exterior surface of the tube and extending radially outward therefrom. These fins are attached to the tube to increase the heat transfer surface. This in turn increases the heat transfer efficiency of the tube and decreases the total number of tubes required in a particular application.

9. Fins have been attached to tubes by several methods, welding being the most practical and most common method.

10. Two welding methods achieve what has been denominated a "fillet" weld. These two methods involve the use of oxyacetylene and metal inert gas (MIG). With the oxyacetylene method, a metal wire is placed at the juncture of the fin and tube and the oxyacetylene gas is applied at that point to form the weld. With the MIG method, the weld is achieved by running a consumable metal electrode along the juncture

of the fin and the tube. Metal inert gas is simultaneously applied at this point to maintain the integrity of the weld while the molten metal cools.

11. A method similar to the MIG method is the TIG (tungsten inert gas) method. Like MIG, an electrical current is applied by means of an electrode at the juncture of the fin and the tube. Tungsten inert gas is simultaneously applied at that point to maintain the integrity of the weld as the molten metal cools. However, unlike MIG, the tungsten electrode is non-consumable. So the weld is formed only from the fin and tube materials and a fillet weld does not result.

12. Other methods are low or standard frequency resistence welding and high frequency resistance welding. These methods involve the application of electrical current to the tube and the fin. When the fin touches the tube there is a melting at the point of contact which forms the weld. A pressure wheel is employed with these two methods, to aid in the bending of the fin, and as a simultaneous operation, to forge the fin to the tube. Like the TIG method the weld is made up of only the fin and tube materials.

13. The AMF Thermatool Corporation owns certain patents on high frequency welding processes. AMF Thermatool developed an apparatus relating to such processes of high frequency welding. It has sold the apparatus to its patent licensees. Escoa and Kentube both are licensees of Thermatool and own and operate Thermatool's high frequency welding apparatus.

14. The fins for finned tubes are made in several different forms. The most common types in commercial use are the solid fins and the segmented fins.

15. Solid fins are made up of a solid metal strip.

16. Segmented fins are made up of a metal strip with vertical segments, the segments being formed by punching slots or cutting slits or serrations of varying depths at

intervals along the length of the strip. When metal is punched out of a strip, the segmented fin is more specifically called a notched fin. When the strip is cut, the resulting segmented fin is more specifically called a serrated fin.

17. The fins are then wound spirally (helically) around the tube, or they are often placed longitudinally along the length of the tube.

18. The foot or base of a fin, that is, the part that is welded to the tube, may also take various forms. the L-type, the U-type, and the I-type are the most common.

19. To form the L-type or the U-type, an L-shaped or U-shaped flange is bent out from the bottom of the fin and this portion is then welded to the tube, usually by low or standard frequency resistance welding.

20. There is no flange on the I-type. The lower edge of the I-type is simply welded to the tube. An identifying characteristic of I-type, however, is the "squeeze-out" or "upset" present at the base of a welded fin. When the fin is forged to the tube, melted material is squeezed out and deposited at the base of the fin.

21. Certain configurations of finned tubing may have advantages or disadvantages over other configurations.

22. Fillet welded tubes, as compared to low or high frequency resistance welded and TIG welded tubes, require the addition of a third material to the weld which in turn leads to additional expense. Resistance welding is also faster than other welding methods and high frequency resistance welding is faster than low or standard frequency.

23. When solid I-type fins are helically wound around a tube and welded thereto by the high frequency resistance welding method, the resulting weld often suffers from what is called a "wrinkling effect". This wrinkling can adversely affect weld quality if it occurs to a great degree. When the solid fin stock is wound around a tube, its outer edge,

called the "tension side", is stretched. At the same time its inner edge, the "compression side", is compressed. This results in a wrinkling of the inner edge, the edge which is welded to the tube.

24. The amount of wrinkling is proportionate, among other things, to the height of the fin stock and the diameter of the the tube. The smaller the diameter of the tube and the higher the fin stock, the more wrinkling will be experienced. Therefore, the wrinkling can be alleviated by using larger diameter tubes and/or shorter fin stock.

25. For finned tubes of equal geometries, less wrinkling is generally achieved with I-type segmented fin stock. When the segments are closely spaced, the serrations or notches, as the case may be, ease the stretching and compressing forces that cause the wrinkling. However, there is some wrinkling with segmented, and it is proportionate, among other things, to the height of the solid or unsegmented portion of the fin stock as compared to the height of the segmented portion. The higher this solid portion, or in other words, the shallower the serrations or notches, the more wrinkling is experienced. If the proportion of solid to segmented is properly adjusted, the I-type segmented fin stock can have greater height with less wrinkling than the solid.

26. Other factors that affect wrinkling are the hardness of the fin material and the gauge or thickness of the fin material. If harder metals, e.g. stainless steel, or higher gauge metals are employed as fin stock, more wrinkling is generally experienced. The harder and higher gauge fin materials are desirable in those finned tube applications where durability and resistance to corrosion are important.

27. For certain geometries, an I-type solid finned tube may have a greater heat transfer surface area than an I-type segmented finned tube of the same geometry.

28. On the other hand, certain heat transfer efficiency advantages can be achieved with the I-type segmented finned tube that cannot be so successfully achieved with the I-type solid finned tube. Increasing the height of the fin stock can increase the heat transfer surface area of a finned tube. When the tubes are smaller in diameter, more can be employed in a particular application. An increase in the number of tubes increases the total heat transfer surface area of a particular application. As the Court has previously found, when compared to I-type solid fin stock, relatively high I-type segmented fin stock can be wound around smaller diameter tubes with less wrinkling, provided the proportion of solid to segmented is properly adjusted.

29. Segmented fins also increase heat transfer efficiency by thinning the "laminar layer", that is, the layer of hot gases closest to the tube surface. This thinning is the result of turbulence created by the segmented fin.

30. Solid finned tubes are generally easier to clean than segmented finned tubes. This can be an important factor in applications where dirtier fuels, e.g. coal, are employed.

31. As compared to solid finned tubes, segmented finned tubes can be more fragile and difficult to handle.

32. The pressure rollers used to bend the fin stock and forge it to the tube wear out more quickly with segmented than with solid fin stock.

33. As compared to L-type and U-type segmented finned tubes, I-type segmented finned tubes have more heat transfer area.

34. The L-type and U-type segmented generally have deeper serrations or notches which decreases the heat transfer area. But these deeper serrations or notches can also increase heat transfer efficiency by increasing the turbulence and thinning of the laminar layer.

35. Also, the L or U-shaped foot on the L-type or U-type limits the number of fins per inch of tube. Because there is no foot on the I-type, it does not have this disadvantage. Having more fins per inch of tube produces a greater heat transfer surface area.

36. Of the two types of segmented finned tube, serrated and notched, the serrated has certain advantages over the notched. Notching is accomplished by mechanically punching the notches out of the fin stock. Material is thereby removed from the fin stock and discarded. Serration does not require the removal of any material and so has an economic advantage in that none of the fin stock is wasted.

37. A result of the removal of material required for the notched is a decrease in the heat transfer surface area, as compared to the serrated. Aside from these disadvantages resulting from the removal of material, there is no material difference between serrated and notched fin.

38. There is clearly a commercial need for helically wound serrated finned tubing. Because of its special characteristics, as noted above, there is a particular need where the finned tube is exposed to high temperatures or a corrosive environment. This need is born out by the considerable commercial success experienced by both the plaintiff and the defendant in the sale of helically wound serrated finned tubing.

39. Patent '228 discloses a segmented finned tube consisting of a helically wound, I-type serrated fin stock continuously welded on its inner edge to a cylindrical tube by the high frequency resistance method, a major portion of the fin stock forming radially extending segments, and the remainder of which fin stock forms a flat, uninterrupted lateral surface extending from the segmented portion to the surface of the tube. (See Plaintiff's Exhibit 1.)

40. Patent '774 discloses a method for continuously

welding helically wound, I-type segmented fin stock to a cylindrical tube by the high frequency resistance method. To achieve the continuous weld, the fin stock is serrated so that the major portion thereof forms segments, the remainder being unserrated and forming the root portion. Electrical contacts are placed on the side of the fin stock and on the tube just prior to the point where the fin will contact the tube as it is helically wound around it. High frequency current is then applied to the two electrical contacts. The current passes between these two contacts as the edge of the root portion and the tube come into contact. This causes the tube and fin to melt at the point of contact. Forging force is then applied to create the bond. (See Plaintiff's Exhibit 2.)

41. The scope of the pertinent art is best represented by the following patents and art publications.

42. A commercial catalog of the Dengensha Company of Hiroshima, Japan, distributed publically in the latter part of 1967, discloses a finned tube consisting of a helically wound, I-type segmented fin stock continuously welded on its inner edge to a cylindrical tube by the high frequency resistance method. During the prosecution of the patents now in suit, this publication was not presented to the Patent Office. (See middle left photo, inside of back cover, Defendant's Exhibit 24; translation of catalog is Defendant's Exhibit 47.)

43. Patent Number 3,047,712, issued to Jack Morris on July 31, 1962, discloses a method of welding helically wound I-type solid fin stock to a tube or other curved surface by the high frequency resistance method without the "wrinkling" effect encountered with solid fin stock of significant height. This method requires in part that the high frequency electrical contact on the fin be placed on its upper edge remote from the weld point. When the fin and the tube come

into contact, the tube contact being shortly in advance of the weld point, the fin is heated from its upper edge to its lower edge by the diagonal path of the current which facilitates the stretching and bending involved when the fin is wound around the tube and thereby avoids the "wrinkling" effect. This patent also discloses the application of rollers to the annealed edge. (See Plaintiff's Exhibit 42 or Defendant's Exhibit 8.)

44. Patent Number 2,821,619, issued to Wallace C. Rudd on January 28, 1958, discloses a method of welding metal strips on edge to other metal strips or plates by the high frequency resistance method. This method requires that the fin electrical contact be placed on the lower edge thereof. Both the fin contact and the plate contact are shortly in advance of the weld point. This patent also discloses the use of a pressure roller above the weld point. (See Plaintiff's Exhibit 43.)

45. Patent Number 3,427,427, issued to Wallace C. Rudd on February 11, 1969, discloses several methods for welding I-type solid fin stock to a tube by the high frequency resistance method. These methods require that the fin electrical contact be located on the side thereof in advance of the weld point. The tube contact is similarly spaced. This patent also discloses the use of rotating mandrels to contour the fin. (See Plaintiff's Exhibit 44.)

46. Patent Number 3,362,058 issued to Jack Morris and Wallace C. Rudd on January 9, 1968, discloses that when an I-type fin stock is serrated except at its edge portions, and then is helically wound around a cylindrical tube, the edge or base of the fin stock will conform to a series of straight lines. This effect, which has been called the "Morris" effect, can cause irregularities when the fin stock is welded to the tube. The patent gives methods for overcoming that effect. One method requires that the fin strip

be wound in an almost flat relation to the surface of the tube. After welding, the fin stock is combed up so it extends radially from the surface of the tube. The resulting fin is L-shaped in cross-section. Another method simply requires that L-type fin stock be welded on its base to the tube. It is not clear whether these methods require location of the fin electrical contact on the side of the bottom of the fin. This patent also discloses the use of a pressure wheel. (See Plaintiff's Exhibit 45.)

47. Patent Number 2,870,999 issued to S. H. Soderstrom on January 27, 1959, discloses a heat exchanger unit consisting of segmented finned tubes. It does not disclose a method of welding. However, the patent does disclose that a continuous weld joint between the fin and the tube, and a fin, tube, and weld joint of the same material, would achieve the best results as far as heat exchange is concerned. This patent was applied for in 1956. At that time, the high frequency resistance welding method was not in existence, and the state of the art was not such that a fin could be continuously welded to a tube in the configurations shown in Figures 1 and 2. (See Defendant's Exhibit 6.)

48. Patent Number 3,377,459 issued to J. W. Brown, Jr. and Robert W. Kaase on April 9, 1968 discloses a method for welding solid fin stock to a tube. Except for the fact that this patent does not show the use of segmented fin stock, it essentially discloses all the other elements of patent '774. (See Defendant's Exhibit 11.)

49. Patent Number 3,436,517 issued to Edmond Pignal on April 1, 1969 discloses a process for making helically wound finned tubes. The welding process is different from that of patents '228 and '774. However, this patent does disclose the use of pressure rollers, and the contemplated end result is a solid or segmented I-type fin welded to a tube, even though these end results would be difficult to achieve

because of spacing problems with the electrode and because of a mass imbalance between the fin and the tube. As illustrated in the patent, it would be difficult to properly locate the electrode because of the narrow angle between the fin and the tube. The mass imbalance, especially with the deeply notched fin shown in Figure 5, would cause a large part of the fin to melt away before the tube even begins to melt. The pressure rollers shown in Figure 2 are so small that they would tend to roll up and down the notches on the notched fin. This could interrupt the weld and wear down the rollers very rapidly. (See Defendant's Exhibit 14.)

50. British Patent Specification Number 1,007,243, applied for by the Ohio Crankshaft Company on March 6, 1963, discloses a method for welding helically wound fin to a tube by high frequency welding techniques. The pertinence of this specification is that it shows that that method was used for welding finned tubes as early as 1962, when application was first made for that patent. (See Defendant's Exhibit 18.)

51. French Patent Number 993,849 issued to Pierre-Georges Vicard in 1951 discloses, by reference to the drawings in Figures 1 and 2 only, an I-type serrated fin wound around a tube. (See Defendant's Exhibit 19.)

52. French Patent Number 1,330,292 issued to Biraghi S.A. in 1963, discloses, by reference to Figures 1-4 only, the construction of a finned tube consisting of a tube having helically wound segmented fins on a tube. (See Defendant's Exhibit 20.)

53. A pamphlet published by the Thermatool Corporation in 1965 entitled "Thermatool High-Frequency Welding Applications" does not specifically disclose an I-type notched or serrated fin helically wound to a tube and welded thereto by the high frequency resistance welding process. It does however, show an isometric view of an I-type segmented fin

and cross-sections of various types of I-type fins welded by the high frequency resistance process. Also shown is an I-type solid fin helically wound on a tube and welded by the high frequency resistance welding method. So taken as a whole, this publication discloses that I-type segmented fins can be helically wound around a tube and welded thereto by the high frequency resistance welding process. (See page labeled "D", blocks 1 and 7 under "Fin to Tube Welding", Defendant's Exhibit 21; date of publication determined by reference to Defendant's Exhibit 22.)

54. An article from Product Engineering entitled "High Frequency Welding" published June 7, 1965, does not specifically disclose an I-type notched or serrated fin helically wound around a tube and welded thereto by the high frequency resistance welding method. It does however show the welding of a helically wound solid fin on a tube using high frequency resistance welding and a pressure roller. It also shows cross-sections of various types of I-type fins that could be welded and an isometric view of an I-type segmented fin. This publication as a whole therefore discloses that I-type segmented fins can be helically wound around a tube and welded thereto by the high frequency resistance welding method. (See page labeled "C", box in upper left-hand corner, and page labeled "G", box in upper right-hand corner, Defendant's Exhibit 23.)

55. Patent Number 3,652,820 issued to Robert Carl Boose and applied for on January 26, 1970 makes the following statement in its description of the prior art as of that date:

> "The conventional tubing having extended heat transfer surfaces in finned tubing is manufactured in a variety of configurations. Various type fins include: a flanged fin type in which a major fin portion has a bottom flanged base oriented perpendicular thereto; a channel fin type in which a continuous base has a pair of fin portions extending radially upward therefrom in a U-shaped configuration;

> and an I-type fin in which a flat fin portion has its lower edge forming the base for connection to the tube.
>
> Each of these various fins can be of the continuous or segmented type."

That statement indicates that I-type segmented finned tubing was part of the prior art at the date of application. (See Col. 1, lines 24-34, Defendant's Exhibit 17.)

56. In 1968, Escoa purchased a Thermatool Model UT140 welding apparatus and some appurtenant equipment from AMF Thermatool Corporation. The apparatus itself consists mainly of a high frequency generator. The appurtenant equipment consisted of electrical leads and contacts, and the forging form drive. During the prosecution of the patents here in suit, this device was not presented to the Patent Office.

57. Also in 1968, Escoa, for additional consideration, was granted a license to use the Thermatool apparatus for high frequency welding under certain patents owned by AMF Thermatool. Among these patents were the Rudd patent 2,821,619; the Morris patent 3,047,712; and the Morris and Rudd patent 3,362,058, all previously discussed. (See Defendant's Exhibit 23.)

58. Insofar as the scope of that license is concerned, the license agreement provides in pertinent part as follows:

> "Welding of Spiral and Longitudinal Finned Tube
> This license includes the welding of one or more strips or pieces of metal onto the surface (exterior or interior) of a pipe, tube or solid bar stock such as the manufacture of solid and serrated finned tube or pipe by welding a metal strip or metal segments (connected or not by a base strip) in a spiral or longitudinal path on the surface of the tube or pipe . . ."

59. Mr. Robert Carl Boose first successfully produced a helically wound I-type segmented finned tube welded by the high frequency resistance welding process, as set forth in the claims of patent '228, on a Thermatool apparatus in January of 1969.

60. The patent for that device was first applied for on June 25, 1970.

61. The device set forth in claims 1 and 2 of patent '228 was described in a printed publication from a foreign country, that being the catalog of the Dengensha Corporation of Hiroshima, Japan, before the invention thereof by the applicant for that patent.

62. The date of said printed publication, being the latter part of 1967, was also more than one year prior to the date of the application for patent '228 in the United States.

63. An experienced operator of a Thermatool machine is considered to be an ordinary person skilled in the art of high frequency resistance welding. He has knowledge of the mechanics of the high frequency welding apparatus, including knowledge of the procedure for adjusting welding speed, adjusting the power source, adjusting electrical contacts, and adjusting the pressure wheel. He is aware of the variables in the materials being welded, such as tube diameter, fin height, fin gauge, fin type and the general characteristics of the different materials used to make the tubes and the fins. He is aware of the problems that need to be avoided in a welding operation, such as too much "squeeze-out" or "upset", and the wrinkling that sometimes occurs at the base of a fin when it is welded to a tube. Finally, the operator knows how to adjust the mechanics to the variations in materials to avoid the problems.

64. The prior art teaches the ordinary person skilled in the art several procedures for welding helically wound solid I-type fin stock to a tube by the high frequency resistance welding method.

65. Escoa has been manufacturing helically wound, solid I-type finned tube welded by the high frequency resistance welding method since November of 1968, when it put its first

Thermatool apparatus into operation.

66. The prior art teaches the ordinary person skilled in the art the concept of welding helically wound, segmented I-type finned tube by the high frequency resistance welding method.

67. Nevertheless, prior to January of 1969, when Mr. Boose first successfully produced such a device, the method used by Mr. Boose as is set forth in the claims of patent '774 had not been patented, nor was said method specifically described in any prior art publications.

68. Mr. Boose's success was the culmination of a series of experiments performed on Escoa's Thermatool apparatus.

69. These experiments basically consisted of running a tube and serrated fin through the Thermatool apparatus. Adjustments were made in materials variants, such as tube size, fin height, depth of fin serrations, and in mechanical variants, such as electrical contact size and location, and amount of forging pressure from the pressure wheel.

70. The adjustments in materials and forging pressure were made in response to problems with the cracking of the fin stock as it was wound around the tube. The adjustment of the size and location of electrical contacts was made in response to a problem with the electrical current "arcing" through the serrations, which arcing caused the welding tooling to burn up.

71. As Mr. Boose's method was ultimately set forth in claims 1, 2, 5, 6 and 7 of patent '774, the serration of the fin stock is the only factor which distinguishes that method from the welding of I-type solid finned tubing by the high frequency resistance welding process.

72. Taking into consideration the scope and content of the prior art, and the level of ordinary skill in the art of high frequency resistance welding, the method set forth in patent '774 would have been obvious to an ordinary person

skilled in the relevant art.

73. I-type solid finned tubing is old in the art. High frequency resistance welding is old in the art. Serration of fin stock is old in the art.

74. The innovative characteristics of Mr. Boose's method, that is, those characteristics new to the art, were the adjustments that he arrived at by experimentation, i.e., the size of the fin electrical contact, and the amount of forging pressure applied to the fin.

75. The size of the fin electrical contact and the amount of forging pressure are not set forth in the pertinent claims of patent '774. Even if they had been set forth, these characteristics are not the products of patentable inventiveness, but are rather the products of mechanical expediency.

76. The device set forth in claims 1 and 2 of the '228 patent is an aggregation of elements old in the art which perform no new or different function than that which they previously performed, and the subject matter of said patent would have been obvious to an ordinary person skilled in the pertinent art.

77. The pertinent claims of the '774 patent do not include two of the elements essential to practice the invention. As was noted above, the size of the fin electrical contact and the amount of forging pressure to be applied to the fin are not found in the claims.

78. Several misstatements were made to the patent examiner during the prosecution of the patents now in suit. In particular, as was previously noted, the examiner was not apprised of the Dengensha catalog or the Thermatool welding device. While these were material omissions, the intent and the effect of such omissions has not been proven.

CONCLUSIONS OF LAW

1. This Court has jurisdiction under Title 28 U.S.C. § 1338(a).

2. Venue is properly laid with this Court under Title 28 U.S.C. § 1400(b).

3. This being a suit for infringement of certain claims of two U. S. Letters Patent, the defendant has properly raised the invalidity of those claims as a defense. Title 35 U.S.C. § 282.

4. All patents are presumed valid, and the burden of establishing invalidity rests upon the party asserting it. Title 35 U.S.C. § 282. See Mott Corp. v. Sunflower Indus., Inc., 314 F.2d 872 (10th Cir. 1963).

5. However, where pertinent prior art was not before the patent office, this presumption is significantly weakened. See Beckman Instruments, Inc. v. Chemtronics, Inc. 439 F.2d 1369 (5th Cir. 1970).

6. The presumption of validity has been weakened as to the patents here in suit because the Patent Office was not apprised of the Dengensha Company catalog and the Thermatool apparatus, two very pertinent examples of the prior art.

7. The '228 patent is invalid as being anticipated by the prior art. It lacks the novelty required for patentability. Title 35 U.S.C. § 102(a),(b). See Scaramucci v. Dresser Industries, Inc., 427 F.2d 1309 (10th Cir. 1970); McCullough Tool Co. v. Well Surveys, Inc., 343 F.2d 381 (10th Cir. 1965).

8. The '774 patent does have the novelty required for patentability. Id.

9. However, the '774 patent as well as the '228 patent are invalid because their subject matter is non-obvious. Title 35 U.S.C. § 103. See Sakraida v. Ag Pro, Inc., 425 U.S. 273, 96 S.Ct. 1532, 47 L.Ed.2d 784 (1976); Dann v. Johnston, 425 U.S. 219, 96 S.Ct. 1393, 47 L.Ed.2d 692 (1976);

Anderson's-Black Rock, Inc. v. Pavement Salvage Co., Inc., 396 U.S. 57, 90 S.Ct. 305, 24 L.Ed.2d 258 (1969); Graham v. John Deere Co., 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed.2d 545 (1966); Rutter v. Williams, 541 F.2d 878 (10th Cir. 1976); Scarramucci v. Dresser Industries, Inc., supra; Boutell v. Volk, 449 F.2d 673 (10th Cir. 1971); McCullough Tool Co. v. Well Surveys, Inc., supra.

10. Even if the product of a patent fills a long felt need in the industry, and meets with great commercial success, these facts alone could not impart patentability to a claim which is lacking in patentable invention. See Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 71 S.Ct. 127, 95 L.Ed. 162 (1950); Anderson's-Black Rock, Inc. v. Pavement Salvage Co., Inc. supra.

11. The claims of a patent are the sole measure of the grant. See Aro Mfg. Co., Inc. v. Convertible Top Replacement Co., Inc. 365 U.S. 336, 81 S.Ct. 599, 5 L.Ed.2d 592 (1961); Graver Tank & Mfg. Co., Inc. v. Linde Air Prods. Co., 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672 (1949).

12. The '774 patent is invalid because the pertinent claims do not particularly point out and distinctly claim the subject matter of the invention. Title 35 U.S.C. § 112. See Halliburton Oil Well Cementing Co. v. Walker, 329 U.S. 1, 67 S.Ct. 6, 91 L.Ed.3 (1946); Permutit Co. v. Graver Corp., 284 U.S. 52, 52 S.Ct. 53, 76 L.Ed. 163 (1931).

13. A patent may be invalidated because of the patentee's fraudulent procurement of that patent. See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965); Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 65 S.Ct. 993, 89 L.Ed.1381 (1945); Hazel-Atlas Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); Beckman Instruments, Inc. v. Chemtronics, supra; McCullough Tool Co. v. Well Surveys, Inc. supra.

14. Such fraud must be proved by clear and convincing evidence. See McCullough Tool Co. v. Well Surveys, Inc., supra.

15. The defendant has not met its burden of proof in regard to its allegation that the plaintiff perpetrated a fraud upon the Patent Office by failing to apprise it of certain patents and publications comprising a part of the prior art.

16. This is not an "exceptional case" justifying an award of attorney's fees to the defendant. Title 35 U.S.C. § 285. See Halliburton Co. v. Dow Chem. Co., 514 F.2d 377 (10th Cir. 1975).

17. Because the '228 patent and the '774 patent are invalid, they have not been infringed. See Graham v. John Deere Co., supra; Halliburton Co. v. Dow Chem. Co., supra; Ohio Citizens Trust Co. v. Lear Jet Corp. 403 F.2d 956 (10th Cir. 1968); Griswold v. Oil Capital Valve Co., 375 F.2d 532 (10th Cir. 1966).

It is so Ordered this 6th day of april, 1979.

H. DALE COOK, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HOYT C. RICH,

Plaintiff,

v.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education, and Welfare

Defendant.

78-C-436-D

FILED

APR 6 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

Plaintiff, Hoyt Rich, brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of the defendant's final administrative decision finding that the plaintiff was not under a "disability" as defined in the Social Security Act. The plaintiff has filed a Motion to Remand this case "for consideration of additional evidence." Plaintiff's motion is supported by a Brief, and the defendant has filed a Brief in opposition to plaintiff's Motion.

In support of his Motion, the plaintiff claims that this action should be remanded due to the fact that "the Administrative Law Judge obviously misinterpreted Dr. Brocksmith's comments to the effect that Plaintiff should be considered disabled." The plaintiff includes in his Motion statements of Dr. Brocksmith as Exhibits "A" and "B" which were not available to the Administrative Law Judge at the hearing. The plaintiff asserts that those statements will clarify certain remarks of Dr. Brocksmith which did appear in the record and had a direct bearing on the existence of a disability.

42 U.S.C. § 405(g) provides that in order for a remand to be granted, plaintiff must show "good cause." Bradley v. Califano, 573 F.2d 28 (10th Cir. 1978); Bohms v. Gardner, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964, 88 S.Ct. 1069, 19 L.Ed.2d. 1164 (1968); Long v. Richardson, 334 F.Supp. 305 (W.D.Va. 1971); Dunn v. Richardson, 325 F.Supp. 337 (W.D.Mo. 1971); see Hope v. Secretary of Health, Education and Welfare, 347 F.Supp. 1048 (E.D.

Tex. 1972). In determining whether good cause for a remand to the Secretary exists, it must be remembered that the Social Security Act is to be liberally construed as an aid to the achievement of its Congressional purposes and objectives and that narrow technicalities which thwart its purposes are not to be adopted. Schroeder v. Hobby, 222 F.2d 713 (10th Cir. 1955). In these circumstances, courts must not require such a technical showing of good cause as would justify the vacation of a judgment or the granting of a new trial. Wesley v. Secretary of Health, Education and Welfare, 385 F.Supp. 863 (D. D.C. 1974); Epperly v. Richardson, 349 F.Supp. 56 (W.D.Va. 1972); Martin v. Richardson, 325 F.Supp. 686 (W.D.Va. 1971); Sage v. Celebrezze, 246 F.Supp. 285 (W.D.Va. 1965); Blanscet v. Ribicoff, 201 F.Supp. 257 (W.D.Ark. 1962). Remand should be granted where no party will be prejudiced by the acceptance of additional evidence and the evidence bears on the matter in dispute. Epperly v. Richardson, supra; Martin v. Richardson, supra; Sage v. Celebrezze, supra; Blanscet v. Ribbicoff, supra. However, a claimant seeking remand must show the court any new evidence, or at least the general nature of such evidence, sought to be introduced upon remand. Bradley v. Califano, supra; Long v. Richardson, supra.

In the instant case, it appears that certain remarks made by Dr. Brocksmith concerning the plaintiff's ability to do "light work" could have been misunderstood as referring to time periods different from those actually intended by the Doctor. Allowing the plaintiff the opportunity to present additional evidence will not prejudice either party, and will clarify the matter in dispute.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Remand be granted and the Clerk is hereby directed to effect the remand of this case.

It is so Ordered this 6 day of April, 1979.

Frederick A. Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RANGER INSURANCE COMPANY, a foreign corporation,

Plaintiff,

vs.

DALE D. WESTFALL, DAVID W. CARPENTER, ERNEST GLASS, PAMELO CAGLE RUFFIN, LUCINDA VERNON, PEGGY TRENT, wife and next of kin of SAMUEL TRENT, deceased, and LO ANN MOORE, wife and next of kin of CHARLES MOORE, Deceased,

Defendants.

78-C-145-B ✓

FILED

APR 4 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

Pursuant to the Order filed simultaneoulsy this date,

IT IS ORDERED that Judgment be entered in favor of the plaintiff, Ranger Insurance Company, and against the defendants, Lo Ann Moore, wife and next of kin of Charles Moore, deceased; Peggy Trent, wife and next of kin of Samuel Trent, deceased; Pamela Cagle Ruffin; and David W. Carpenter, in accordance with the Order entered herein this date.

ENTERED this 4th day of April, 1979.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF DONALD J. HOWE, d/b/a HOWE PRE-CAST COMPANY,	)	
Plaintiff,	)	
vs.	)	No. 76-C-92-C
COOPER BROS., INC., and KANSAS CITY FIRE AND MARINE INSURANCE COMPANY,	)	
Defendant.	)	

AMENDED JOURNAL ENTRY OF JUDGMENT

In accordance with the Judgment and Opinion entered herein by the United States Court of Appeals for the Tenth Circuit, the Journal Entry of Judgment entered by this Court on December 9, 1976 is hereby amended as follows.

NOW, on this 4th day of November, 1976, there comes on for hearing upon the merits the matter of the Cross-Complaint of Cooper Bros., Inc., against Donald J. Howe, d/b/a Howe Pre-Cast Company, the original Complaint of the Plaintiff having been dismissed on September 24, 1976, by virtue of the Plaintiff failing to appear and show cause why his Complaint should not be dismissed; Plaintiff, Donald J. Howe, appearing in person and by and through his counsel, Paul F. McTighe, Jr.; Defendant, Cooper Bros., Inc., appearing by and through J. Dennis Ryan, its attorney of record, and by Richard L. Cooper, Vice President of Cooper Bros., Inc. The parties announcing ready for trial, and the Court, having examined the files, reviewed the record, heard all of the testimony and received all of the documentary evidence, makes the following findings of fact:

That Cooper Bros., Inc., and Howe Pre-Cast Company did enter into a contract on the 20th day of March, 1974; that

Howe Pre-Cast Company was to furnish and pay for all materials and labor and perform in a good and workmanlike manner all work necessary to complete the construction of the pre-cast columns and panels on the Gilcrease Branch Post Office in Tulsa, Osage County, Oklahoma.

That paragraph 7 of the contract provided that the work to be performed by the subcontractor shall be executed by skilled and reputable mechanics and laborers satisfactory to the contractor and the work to be done shall fully comply with plans and specifications aforesaid, and shall meet the approval and acceptance of the contract owner and the architect. That on the 4th day of October, 1974, there were four columns delivered to the job site, and three of them were placed in place. At the time said columns were placed in their predetermined location on the job site, warpage in the columns was discovered. Mr. Howe was immediately contacted, and the architects for the Post Office job and the Post Office Department were contacted concerning this defect. Many conferences were had between the parties, the architects and the inspectors. The evidence shows that the storage at the site was the same as it was at the point of manufacture. Trouble with the pre-cast materials was from the date of initial delivery, and the architects rejected the columns.

The Court is satisfied from the evidence and finds as a matter of fact that the columns are not in conformance with the contract; that by reason of failure of the pre-cast materials to meet the requirements of the contract, Cooper Bros., Inc., was caused delay in the contract, and incurred extra expense for labor and materials in completing the contract; that Cooper Bros., Inc., used reasonable precautions to avoid substantial increase in the costs of correcting the problems, in attempting to mitigate any damages.

The Court further finds that the total expenses for labor and materials in excess of the amount of the contract

are greater than those which Defendant, Cooper Bros., Inc. pled in their Answer; that because no motion to amend the pleadings to conform to the proof was timely filed, Plaintiff is limited to that sum for labor and materials which it alleged to be in excess of the contract as to its damages; said sum being $2,230.80.

That the evidence introduced at the time of trial showed by an overwhelming preponderance of the evidence that Defendants acted in good faith at all times, and mitigated any damages that were necessary for Plaintiff's failure to perform his contract.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT:

That the Defendant be awarded the sum of $2,230.80 as damages for breach of contract, and costs of this action, all for which let execution issue.

It is so Ordered this 4th day of April, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DENVER V. MOORE and ELLEN M. MOORE, Plaintiffs,	)	
vs.	)	NO. 78-C-335-B ~~C~~ V
THE HOME INSURANCE COMPANY, a foreign insurance company, Defendants.	)	

FILED
APR 4 1979
Jack C. [illegible], Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

ON THIS 4th day of April, 1979, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said plaintiff confesses that the Motion for Summary Judgment of the defendant is good and valid and both parties therefore request the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and the same hereby is dismissed with prejudice to any future action.

JUDGE, UNITED STATES DISTRICT COURT

APPROVALS:

JAMES E. FRASIER,

Attorney for the Plaintiff,

ALFRED B. KNIGHT,

Attorney for the Defendant.

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LARRY DON ROSE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHEMICAL EXPRESS CARRIERS, INC.,	)	
	)	
Defendant,	)	No. 76-C-46-C
	)	
and	)	
	)	
TRANSPORTATION EMPLOYEES ASSOCIATION, affiliated with DISTRICT 2, MEBA, AFL-CIO,	)	
	)	
Necessary Party.	)	

FILED

APR 4 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

This matter came on for consideration on this 4th day of April, 1979 upon the Joint Application for Agreed Dismissal of Class Action included in the Complaint filed herein. The Court being duly advised in the premises, finds that said application for dismissal is in the best interests of justice and should be approved, and the class action allegations should be dismissed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Joint Application for Agreed Dismissal of Class Action by the parties be, and the same is hereby, approved and the class action allegations in the above styled and numbered cause of action and Complaint are dismissed.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

APPROVED:

DARRELL L. BOLTON
Attorney for Plaintiff

DONALD CHURCH
Attorney for Defendant

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARIE STANLEY, Plaintiff,	)	
vs.	)	
S. S. KRESGE COMPANY, Defendant.	)	NO. 76-C-633-C

ORDER OF DISMISSAL

The Court finds that plaintiff has failed to obtain new counsel or have new counsel enter an appearance herein as ordered by the Court on January 15, 1979. Upon application of the defendant, the plaintiff's cause of action is dismissed for failure to prosecute.

Dated this 3rd day of April, 1979.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LOYD RAY BRAZEAL,

Petitioner,

v.

MACK ALFORD, Warden, et. al.,

Respondents.

No. 78-C-584

FILED

APR 3 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Loyd Ray Brazeal. This cause was originally assigned to the Honorable Allen E. Barrow, now deceased. However, the undersigned Chief Judge of this United States District Court has reviewed the petition, response, traverse, transcripts and files of the state proceedings, and being fully advised in the premises, finds:

Petitioner is a prisoner at the Stringtown Correctional Facility, Stringtown, Oklahoma, serving a sentence to twelve years imprisonment. Sentence was imposed upon Petitioner's conviction by jury in the District Court of Craig County, State of Oklahoma, Case No. CRF-77-125, of burglary in the second degree after former conviction of a felony. On direct appeal to the Oklahoma Court of Criminal Appeals, Case No. F-78-151, the conviction was affirmed by unreported opinion filed October 30, 1978.

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights guaranteed by the Constitution of the United States of America in that:

1. The trial court failed to grant a mistrial when state witness, Sheriff Jess Walker, described to the jury finding two guns in the car Petitioner was identified as having driven prior to his arrest. Said testimony received after an agreement on the record not to introduce the guns.

2. The trial court allowed the state to introduce weapons alleged to have been stolen during the burglary which were seized in an unlawful arrest without probable cause.

3. The bailiff's conduct and communication with the jury during deliberations deprived Petitioner of a fair trial.

4. There was insufficient evidence to support the verdict which was contrary to the law and evidence.

Respondents present, pursuant to Moles v. State of Oklahoma, 384 F.Supp. 1148, 1150 (W.D.Okla. 1974), that state remedies have not been exhausted in that Petitioner has not filed an application for post-conviction relief pursuant to 22 O.S.A. § 1080, et seq. However, the claims presented to this Court were presented to the Oklahoma Court of Criminal Appeals on direct appeal and found to be without merit. The Supreme Court of the United States has held that once the substance of a federal habeas corpus claim has been "fairly presented" to the state courts, the exhaustion requirement has been satisfied. Picard v. Connor, 404 U.S. 270 (1971). Also see, Sandoval v. Rodriguez, 461 F.2d 1097 (10th Cir. 1972); Chavez v. Baker, 399 F.2d 943 (10th Cir. 1968) cert. denied 394 U.S. 950 (1969). This cause before the Court is not the type where an evidentiary hearing in a post-conviction proceeding could develop the facts more fully, on the contrary, the claims presented may be decided on the present record and transcripts as a matter of law. There is no necessity for an evidentiary hearing and the petition is without merit and should be denied and the case dismissed.

Issues one and four, regarding the admission of evidence and the sufficiency of the evidence, respectively, are not cognizable in federal habeas corpus proceedings unless the conviction is so devoid to evidentiary support as to raise a due processs issue, Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970); Mathis v. People of the State of Colorado, 425 F.2d 1165 (10 Cir. 1970); or unless the rulings on the admissibility of evidence render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights, Gillihan v. Rodriguez, 551 F.2d, 1182, 1192-93 (10th Cir. 1977) cert. denied 434 U.S. 845 (1977); Praxedes v. Cobarrubio v. Ralph Lee Aaron, No. 76-2112 Unreported (filed July 27, 1977). No such federal constitutional violations are found in the trial record and Petitioner's first and fourth claims are without merit.

The second issue regarding the introduction into evidence of weapons seized in an unlawful arrest without probable cause is also without merit. The officers were investigating a prowling complaint

at the behest of a citizen seeking assistance. The weapons about which Petitioner complains were found in plain view in an open field where the officers had a right to be in reasonably close proximity to Petitioner and his co-defendant. The weapons were not obtained as the result of the arrest of Petitioner and his co-defendant, and no incriminating admissions or statements were received or introduced at trial. Even had the arrest been unlawful, illegal arrest standing alone neither affects the jurisdiction of the court nor precludes the trial of an accused for an offense. See, Capes v. State of Oklahoma, 412 F.Supp. 1111 (W.D.Okla. 1975); Gerstein v. Pugh, 420 U.S. 103 (1975); Runge v. United States, 427 F.2d 122 (10th Cir. 1970).

This Court in reviewing the record finds no error by the bailiff in dealing with the jury that the foreman had reported deadlocked. To keep the jury together in the jury deliberation room while report was made to the trial judge was entirely proper, in fact, any different action by the bailiff might well have been suspect. The state courts accurately and properly decided this matter. 22 O.S. 1971 § 857. See, In re King, 51 F. 434 (M.D.Tenn. Cir. 1892). Petitioner's third issue in the circumstances before the Court raises no fact showing a federal constitutional violation and is not cognizable in federal habeas corpus. The third issue presented by Plaintiff is without merit.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Loyd Ray Brazeal be and it is hereby denied and the case is dismissed.

Dated this 3rd day of April, 1979, at Tulsa, Oklahoma.

H. DALE COOK, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HERBERT HUMPHREY,

Plaintiff,

v.

WHEATLEY COMPANY,

Defendant.

Case No. 78-C-374-C

FILED

APR 2 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION FOR DISMISSAL

It is hereby stipulated by Herbert Humphrey, Plaintiff, and Darrell Bolton, attorney for Plaintiff, and Wheatley Company, Defendant, by Mary T. Matthies, its attorney, that the above-titled action be dismissed with prejudice without cost to either party.

Dated this 28 day of March, 1979.

FILED

APR 3 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Herbert L Humphrey
Herbert Humphrey

Darrell Bolton
Darrell Bolton

Mary T. Matthies
Mary T. Matthies

ORDER

It appearing to the Court that the above-entitled cause has been fully settled, adjudicated, and compromised, and based upon stipulation it is hereby Ordered and Adjudged that the above entitled cause be and the same is hereby dismissed without cost to either party and with prejudice to the Plaintiff.

Dated this 3rd day of April, 1979.

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRANCES R. CARTER, Individually and as Mother and Next Friend of JEFFREY GILES CARTER and BRADLEY THOMAS CARTER, Minors; and MICHAEL KEITH CARTER and KERRY CARTER,

Plaintiffs,

V.

IDA M. HORETH, Administratrix of the Estate of John M. Horeth, Deceased; and WENDELL W. CLARK, Administrator of the Estate of Ricardo Enrique Sanchez-Vegas, Deceased,

Defendants.

No. 76-C-433 (B) C

FILED

APR 2 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

This cause came on to be heard on plaintiff's Stipulation for Dismissal with Prejudice of said cause and after hearing counsel for the respective parties, and the Court being fully advised,

IT IS HEREBY ORDERED that any and all claims against the defendants, Ida M. Horeth, Administratrix of the Estate of John M. Horeth, Deceased, and Wendell W. Clark, Administrator of the Estate of Ricardo Enrique Sanchez-Vegas, Deceased, be and are hereby dismissed with prejudice, each party to bear his own costs.

DATED: April 2, 1979.

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM HERSCHEL MURRAY,
Plaintiff,
v.
D. R. COMSTOCK and R. A. WOOD,
Individually and as police officers
of the Police Department of the City
of Tulsa, Oklahoma,
Defendants.

NO. 77-C-139-D

ORDER

This is a civil rights action brought by Plaintiff under 42 U.S.C. § 1983. On February 14, 1979, the Honorable Allen E. Barrow entered an Order allowing counsel to withdraw as attorneys of record for Plaintiff and requiring Plaintiff to secure new counsel and have counsel make an appearance of record within ten days, failing which dismissal for failure to prosecute would be entered.

Having been assigned this cause upon the death of Judge Barrow, the undersigned United States District Judge has reviewed the file, and being fully advised in the premises, finds that affidavit has been filed by former co-counsel of the Plaintiff that a copy of the Order dated and filed February 14, 1979, was mailed to Plaintiff, with sufficient postage pre-paid, at his last known address. Plaintiff has not complied with the order, made request to proceed pro se, or requested an extension.

Inherent in the power of federal courts is the power to control their dockets. Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972); see, Link v. Wabash Railroad Co., 370 U. S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). Therefore, in appropriate circumstances, a district court may dismiss a complaint on the Court's own motion. Diaz v. Stathis, 440 F.Supp. 634 (D.Mass. 1977), aff'd, 576 F.2d 9 (1st Cir. 1978); see, Literature, Inc. v. Quinn, 482 F.2d 372 (1st Cir. 1973); see, e.g., Maddox v. Shroyer, 302 F.2d 903 (D.C. Cir. 1962), cert. denied, 371 U. S. 825, 83 S.Ct. 45, 9 L.Ed.2d 64 (1962).

In the instant case, Plaintiff has failed to comply with the Court's Order of February 14, 1979. Failure to comply with said Order is not a matter that goes to the merits of Plaintiff's Complaint itself and thus does not require dismissal of Plaintiff's action. See, Petty v. Manpower, Inc., ___ F.2d ___ (10th Cir. 1979). Accordingly, the Court finds and concludes that Plaintiff's Complaint should be dismissed without prejudice for failure to comply with the Court's Order. See, Maddox v. Shroyer, Supra.

It is so ordered this 2nd day of April, 1979, at Tulsa, Oklahoma.

Fred Daugherty
United States District Judge